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In The

Supreme Court of the United States

October Term, 1994

RICHARD ARRINGTON, JR., *et al.*,

Petitioners,

v.

ROBERT K. WILKS, *et al.*,

Respondents.

Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES P. ALEXANDER
Counsel of Record
ANNE R. YUENGERT
BRADLEY, ARANT, ROSE & WHITE
2001 Park Place,
Suite 1400
Birmingham, Alabama
35203-2736
(205) 521-8000

Counsel for Petitioners Richard Arrington, Jr., and The City of Birmingham

Of Counsel:
DEMETRIUS C. NEWTON
City Attorney
CITY OF BIRMINGHAM
600 City Hall
Birmingham, Alabama
35203
(205) 254-2372

JAMES WALKER MAY
ABDUL K. KALLON
BRADLEY, ARANT, ROSE & WHITE
2001 Park Place,
Suite 1400
Birmingham, Alabama
35203-2736
(205) 521-8000

Counsel for Petitioners Richard Arrington, Jr., and The City of Birmingham

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether pursuant to a judicially-approved consent decree resolving pattern and practice employment discrimination litigation, a public employer, whose statutorily-mandated reliance upon discriminatory testing and ranking procedures has tainted the applicant pool for promotion, can lawfully utilize promotional goals which exceed the proportion of black candidates in the contaminated applicant pool, in order timely to remedy such discrimination.

2. Whether flexible, non-mandatory, fixed-percentage interim promotional goals, establishing the speed the parties undertake to eradicate past discrimination, and which merely delay the promotion of non-minorities and terminate once a representative work force is attained, are lawful.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Kenneth O. Ware
Phillip H. Whitley
Marshall G. Whitson
Robert K. Wilks
David H. Woodall

Plaintiff-Intervenor

United States of America

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
Jefferson County Personnel Board
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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No. 94___

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Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard Arrington, Jr. and the City of Birmingham respectfully request this Court to issue a Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on May 4, 1994. In addition, petitioners respectfully request this Court to reverse the judgment of the Court of Appeals and remand the case with directions to enter a judgment affirming the order of the District Court entered herein on August 14, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit at issue is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, *reh'g denied* (slip op.), *reh'g en banc denied*, ___ F.3d ___, 1994 WL 697742 (11th Cir. 1994). The opinion of the District Court is reported in *Bennett v. Arrington*, 806 F. Supp. 926 (N.D. Ala. 1992). All of the opinions are reproduced in the Appendix at pages 1a-83a.

JURISDICTION

The opinion of the Court of Appeals was filed on May 4, 1994. The Court of Appeals denied a Petition for Rehearing on November 25, 1994, and denied the Suggestion for Rehearing *En Banc* on December 14, 1994. This petition for a writ of *certiorari* is being filed within 90 days of the entry of the Court of Appeals' Order denying the Petition for Rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions, statutes, and regulations involved are: The Fifth and Fourteenth Amendments to the Constitution of the United States and Section 703 of the Civil Rights Act of 1964, as amended, 42 U.S.C.

§ 2000(e)-2. Each is set forth in pertinent part, in the Appendix at 269a-270a.

STATEMENT OF THE CASE

In 1974 and 1975, the United States, certain individual plaintiffs (the "Martin plaintiffs"), and the Ensley, Alabama Branch of the NAACP, commenced three employment discrimination actions against the Jefferson County Personnel Board (the "Board"),[1] the City of Birmingham (the "City"), and other local municipalities. The lawsuits alleged that the Board's testing, selection, and ranking practices and the City's hiring and promotion practices discriminated against blacks and women in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. After two trials relating to certain of the Board's testing and screening practices, in 1981 the City entered a consent decree with the United States and the private plaintiffs ("City Decree") settling the "pattern and practice" employment discrimination litigation pending against the City. The Board entered a companion decree contemporaneously with the same plaintiffs. After public notice and a fairness hearing, both decrees were

[1] The Board is an independent governmental agency, created under Alabama law to administer the civil service system for Jefferson County and its municipalities. The Board prescribes the written examinations which it uses to rank-order applicants for hiring and promotion and provides the names of those applicants to the City for consideration. It is not subject to City control.

approved by the district judge. *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981).

The decrees enjoined the City and the Board from discriminating on the basis of race or sex and remedied the virtual exclusion of blacks and women from the more desirable positions in the City's workplace. The City Decree established long term and interim goals for the hiring and promotion of blacks and women, subject to the availability of qualified candidates. The City Decree, principally drafted by the United States Department of Justice, obligated the City to make race- and gender-conscious promotions of qualified blacks and women to jobs from which blacks and women either were totally excluded or were grossly under-represented as a result of the previous employment practices. The long term goal – a useful measure of the extent to which the prior discriminatory employment system had been dismantled – was the employment of blacks and women in percentages approximating their representation in the civilian labor force of Jefferson County. The City Decree also established varying interim annual hiring or promotional goals for approximately 100 positions, including fire lieutenant. The decrees provided that after six years any party could move to dissolve or modify them. When the City made the first race-conscious promotions to fire lieutenant, a position from which blacks had been completely excluded prior to 1982, white male firefighters immediately challenged those promotions as "reverse" discrimination. Similar reverse discrimination actions followed in the police and other City departments.

Prior to trial of the reverse discrimination claims, the District Court severed issues relating to the validity of the Board's screening and ranking procedures and stayed discovery as to those matters. *In re Birmingham Reverse Discrimination Employment Litigation*, 37 Fair Empl. Prac. Cas. (BNA) 1, 7 (N.D. Ala. 1985). In 1977, however, before the entry of the decrees, the District Court found the entry level Board examinations in both police and fire to be discriminatory. *Ensley Branch, NAACP v. Seibels*, 14 Fair Empl. Prac. Cas. (BNA) 670 (N.D. Ala. 1977), *aff'd in part*, 616 F.2d 812 (5th Cir. 1980). The Board has offered no evidence and the District Court has made no determination regarding the "job relatedness" of most of the Board testing instruments which have demonstrated adverse impact against blacks in promotions.[2]

After a trial in December 1985, the District Court held: that the white firefighters' challenges were impermissible collateral attacks on the decrees, that the challenged promotions were required by the City Decree, and that the remedial measures provided by the decrees – including the promotions at issue – were lawful. *In re Birmingham Reverse Discrimination Employment Litigation*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985). On appeal, the Eleventh Circuit reversed and remanded for retrial, holding that, because appellants were not parties to the decrees, they were not estopped from collaterally

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[2] As noted by the Eleventh Circuit in a companion case: "Thirteen years after the consent decrees took effect, the Board is still unable or unwilling to demonstrate the legality of a single exam." *Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548, 1571, *reh'g en banc denied*, ___ F.3d ___, 1994 WL 697621 (11th Cir. 1994).

attacking the remedies established by the decrees. *In re Birmingham Reverse Discrimination Employment Litigation* (BRDEL I), 833 F.2d 1492 (11th Cir. 1987). This Court affirmed. *Martin v. Wilks*, 490 U.S. 755 (1989).

In October, 1991, on remand, the District Court held a second trial on the reverse discrimination claims and, on August 14, 1992, found the decrees lawful. *Bennett v. Arrington*, 806 F. Supp. 926 (N.D. Ala. 1992). On appeal, the Eleventh Circuit determined, under both Title VII and constitutional standards, the trial court was correct in its finding that affirmative action was justified to remedy past discrimination in City employment. *In re Birmingham Reverse Discrimination Employment Litigation* (BRDEL II), 20 F.3d 1525, 1545 (11th Cir. 1994). However, the Eleventh Circuit held that the interim, annual promotional goal for fire lieutenant was unlawful under both Title VII and the Equal Protection Clause and ordered "appropriate relief." *Id.* at 1549-50.

With one judge dissenting, the Eleventh Circuit denied petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc*. ___ F.3d ___, 1994 WL 697742. This petition for a writ of *certiorari* followed.

REASONS FOR GRANTING THE WRIT

I. The Decision By The Court Below Is In Direct Conflict With The Applicable Decisions Of This Court.

A. This Court's decision in *City of Richmond v. J.A. Croson* does not bar employers from using work force parity as an index of a remedy for past discrimination.

The Court of Appeals, relying on this Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), concluded that the decrees' interim promotional goals are unconstitutional racial quotas which cannot withstand strict scrutiny. *BRDEL II*, 20 F.3d at 1548. The Court of Appeals held that use of the interim fifty percent goal, which was adopted by the consent decree parties and approved by the trial court, to attain the long term goal of a work force of fire lieutenants reflecting black employment in proportion to the percentage of blacks in the local labor force, is unconstitutional because it is " 'completely unrealistic' [to assume] that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* (quoting *Croson*, 488 U.S. at 507). However, this Court's decision in *Croson* does not prohibit the decrees' long term goal of employing blacks in percentages which approximate their representation in the local civilian labor force.[3] The facts

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[3] In 1981, when the decrees were negotiated, blacks made up 49.9% of the civilian labor force in Birmingham. Presumably, it would have been lawful for the City to link its hiring goals, at least for entry level positions, to this percentage. However, to reduce the impact of the decrees on nonminorities, the consent decree parties – at the urging of the City – chose to use as a

of *Croson* did not present and therefore this Court did not address, the circumstances under which the use of court-approved affirmative action to remedy specific incidents of past discrimination is valid. Unlike Richmond which adopted the *Croson* procurement plan without a finding of identifiable discrimination by the City of Richmond, the City, as well as other consent decree parties, negotiated the decrees in light of the strong evidentiary basis for concluding that race-conscious relief was necessary to remedy the virtual exclusion of blacks from City employment. *Id.* at 1540, 1545. Accordingly, because *Croson* does not address whether attaining work force parity is an acceptable affirmative action measurement when an employer has a demonstrated history of discrimination against blacks, the Court of Appeals erred in overturning the District Court, relying exclusively on *Croson*, instead

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measurement the labor force of Jefferson County, which was only 28.1% black. *Bennett v. Arrington*, 806 F. Supp. at 931 n.9.

As the District Court found, and no party has disputed, the position of firefighter is an unskilled position for which the civilian labor force is an appropriate measure of availability. *Id.* at 931. *See also Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (" . . . [a]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."). Because promotions in the fire department are virtually all awarded within its own ranks and the skills necessary are all obtained by firefighters, no principled argument exists that blacks ought not to be represented in the officer ranks in approximate proportion to the labor force. This is especially true given the consent decree parties' conservative choice of the county – not City – labor force.

of other decisions of this Court which specifically addressed plans to remedy past discrimination in the employment context.

This Court has approved the use of racial parity with the local labor pool as an appropriate litmus for the elimination of the vestiges of demonstrated prior discrimination. For example, in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), this Court held that where, as here, an employer has engaged in pervasive, egregious discrimination, Title VII permits it to utilize accelerated short term goals until it achieves parity with the relevant local labor force. *Weber*, 443 U.S. at 208-209; *see also United States v. Paradise*, 480 U.S. 149, 176-82 (1987) (plurality op.) (because of past delays, a short term promotional goal of 50% black hires is a permissible method to achieve long term goal of 25% black state troopers promptly); *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 444-451 (1986)(upholding lawfulness of accelerated interim goals that "end as soon as the percentage of [minority union members] approximates the percentage of [minorities] in the local labor force" (quoting *Weber*, 443 U.S. at 208-209)).

Notwithstanding this Court's precedents and evidence to the contrary, the Court of Appeals held the interim goals serve no legitimate purpose, and further the maintenance of an unconstitutional racial balance. *BRDEL II*, 20 F.3d at 1548. The record is devoid of any basis for such a polemic finding. As recognized by the District Court, both the language of the decrees and their application clearly show that the fifty percent interim goal was not itself the ultimate goal, but simply an interim measure which regulated how quickly the City progressed toward its ultimate goal of promoting black candidates to

the fire lieutenant position, a position from which they had previously been excluded. Such accelerated hiring goals are constitutional, as long as they are not designed to maintain a racial balance. *See, e.g., Paradise*, 480 U.S. at 179-180; *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987). As the District Court's Modification Order makes clear, the interim goals are temporary and terminate once the City attains the long term goal for a position. App. at 92a.[4]

B. The decisions of this Court provide the mechanism for employers to set promotional goals greater than the minority percentage in a qualified labor pool tainted by the employer's prior discriminatory practices.

The Court of Appeals held that the City Decree, which established interim goals for the promotion of blacks at a rate greater than the black representation in the tainted labor pool, is unconstitutional. 20 F.3d at 1549. Although this Court has long recognized that affirmative action hiring goals must be derived from the percentage of minorities in the relevant labor pool, this Court has authorized employers to deviate from the minority percentage in the applicable labor pool in order to achieve an accelerated remedy. *Weber*, 443 U.S. at 208-209. Similarly, this Court has authorized court-ordered promotional

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[4] The Eleventh Circuit reversed in part the District Court's consent decree modifications. *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

remedies, which were not tied to the percentage of minorities in the job immediately below the promotional position, to remedy egregious patterns of racial exclusion. *Paradise*, 480 U.S. at 176-182.

The City, legally authorized to hire only candidates certified by the Board, discriminated against blacks both at the entry and promotional levels. Because of this discriminatory hiring practice, as of July 21, 1981, only 9.3% of the firefighters were black, and none of the fire lieutenants, captains, or battalion chiefs were black. *Bennett v. Arrington*, 806 F. Supp. at 930. Absent the Board's discriminatory practices, it is obvious that the entry level firefighter position, the labor pool from which promotions to fire lieutenant are made, would have had a higher number of blacks.[5] Under these circumstances, characterizing this tainted entry level pool as the qualified labor pool – a premise embraced by the Eleventh Circuit – is not warranted. This issue of what constitutes the qualified labor pool, when an employer is seeking to remedy discrimination in promotions from an entry level pool whose composition was contaminated by the employer's same discriminatory practices, is of great public importance. Because the Board's discriminatory selection and ranking procedure has restricted the number of blacks in the qualified labor pool from which

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[5] Expert testimony established that the operation of the consent decrees' affirmative action provisions resulted in a racial composition in the City's fire department that approximates what it would have been absent prior discrimination. 1991 Trial Transcript, Excerpts of direct examination of David W. Peterson, Ph.D., App. at 264a-268a. Dr. Peterson's study is reprinted in App. at 247a-263a.

the City must promote, the City must be allowed to look for a goal beyond the entry level qualified labor pool when discharging its obligations to remedy discrimination. *See Bennett v. Arrington*, 806 F. Supp. at 929 ("The discriminatory restrictions on these entry-level positions also meant, of course, that blacks had been denied the opportunity to hold higher level positions in these departments."). Otherwise, prior discrimination at the entry level utterly frustrates the remedy at the promotional level. In effect, the Eleventh Circuit mandates a remedy that perpetuates the status quo, protecting those white incumbents who were the beneficiaries of an employment system which excluded black competitors.

The Court of Appeals' decision to restrict any promotional goals to the percentage of minorities in the tainted entry level labor pool prevents the City from adequately remedying its past discrimination, and effectively ratifies the past discrimination. Surely the Constitution does not mandate that a remedy for discrimination be dribbled down for literally generations. Indeed, as another panel of the Court of Appeals stated in the companion case challenging the District Court's 1991 modification orders, "[p]ublic employers cannot escape their constitutional responsibilities merely by adopting facially-neutral policies that institutionalize the effects of prior discrimination and thus perpetuate *de facto* discrimination." *Ensley Branch, NAACP v. Seibels*, 31 F.3d at 1575 (*citing United States v. Fordice*, ___ U.S. ___, 112 S. Ct. 2727, 2735-36 (1992)). In order adequately to remedy its past discrimination at all levels of the fire service, the City should be allowed to take into account the reduced number of blacks at the entry level firefighter position and the

number of blacks that would have been at that position, but for the discrimination.[6]

This Court's decisions in *Weber* and *Paradise* authorize an employer to set promotional goals higher than the proportion of minorities in the qualified labor pool, if the employer's past and present discrimination practices has tainted the percentage of minorities in the qualified labor pool. The *Weber* rationale that an employer can use accelerated short term goals to remedy pervasive, egregious discrimination at the entry level is equally applicable to discrimination at the promotional level. Otherwise, the effects of past discrimination are perpetuated unconscionably. Furthermore, the Court of Appeals' reasoning for refusing to uphold the interim promotional goals under a *Paradise* rationale, on the basis that they were voluntary, "is distinction without a substantive difference." *BRDEL II*, ___ F.3d ___, 1994 WL 697621 (denial of petition for rehearing *en banc*) (Hatchett, J., dissenting). The decisions of this Court do not warrant such a ruling by the Court of Appeals.[7] Moreover, the other circuit court of appeals which has decided the constitutionality

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[6] *See supra* note 3. *Cf. Edwards v. City of Houston*, 37 F.3d 1097, 1113 (5th Cir. 1994) (remedial promotions in consent decree are narrowly tailored because they were "only directed to those positions where the discrimination occurred . . . [and were] in direct proportion to the amount of discrimination . . . [minorities] suffered.").

[7] Albeit perhaps without a detailed analysis of these decrees, during oral arguments in *Martin v. Wilks*, Justice O'Connor observed that "it is entirely possible, if not likely" that the decree challenges would fail. Transcript of proceedings, January 18, 1989, at 25-26.

of voluntary consent decree promotional goals that were not tied to the proportion of minorities in the applicable labor pool, relied on *Paradise* to uphold that portion of the decree. *See Aiken v. City of Memphis*, 37 F.3d 1155, 1164-65 (6th Cir. 1994).

II. The Decision By The Court Below Is In Direct Conflict With Decisions By The Fifth and Sixth Circuits On The Same Issue.

The Court of Appeals' ruling that the City's interim goals are impermissible, rigid and inflexible quotas, *BRDEL II*, 20 F.3d at 1548-49, is contrary to recent decisions from the Courts of Appeals for the Fifth and Sixth Circuits. The Court of Appeals ignored record evidence which demonstrated that the City applied the interim goals flexibly and, in fact, waived them when no blacks qualified for the promotions. *Bennett v. Arrington*, 806 F. Supp. at 930-31. The record clearly confirms that in the nine years the promotional goals were in effect, despite the provision for a fifty percent interim black promotion rate, whites nonetheless received sixty percent of the promotions. The promotional goals did not foreclose the promotion of white firefighters; in many instances, they merely delayed the promotions of white firefighters. Based on this evidence, the Court of Appeals' characterization of the interim goals as a rigid quota is unsupported. The promotional delays of white candidates caused by the decrees are lawful because promotional delays are less intrusive than layoffs and are a permissible means of remedying past discrimination. *See Paradise*, 480 U.S. at 183 ("Because the one-for-one requirement is so limited in scope and duration, it only postpones the promotions of

qualified whites. Consequently, like a hiring goal, it impose[s] a diffuse burden, . . . foreclosing only one of several opportunities. . . . Denial of a future employment opportunity is not as intrusive as loss of an existing job . . . and plainly postponement imposes a lesser burden still.") (internal quotation marks and citations omitted).

The Courts of Appeals for the Fifth and Sixth Circuits have upheld provisions in consent decrees similar to those in the City Decree. In *Edwards v. City of Houston*, 37 F.3d 1097 (5th Cir. 1994), the Fifth Circuit, relying upon this Court's decision in *Paradise*, upheld a consent decree which mandated that ninety-six promotions in the Houston police departments be set aside for African-Americans and Hispanics over a five-year period. The Fifth Circuit relied on the fact, as in this case, that only qualified minorities who have passed the relevant promotional exams were eligible for the remedial promotions, in finding that the decree did not "impose an absolute bar to the promotion of non-minorities." *Edwards*, 37 F.3d at 1114. Similarly in *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994), the Sixth Circuit, also relying on *Paradise*, upheld a provision of a decree which actually mandated that, without regard to the percentages of blacks at the entry level positions, the Memphis fire department must reserve at least twenty percent of the annual promotions for blacks: "This floor, however, is merely a *means* of speedily realizing the long-term goals of the decrees. And the result reached in *Paradise* makes clear that it is a permissible means of realizing those goals." *Aiken*, 37 F.3d at 1164-65. The City's Decree, like the decrees approved by the Fifth and Sixth Circuits, allowed a

waiver of the interim goals when no blacks qualified for the promotions. Furthermore, under the reasoning of the Fifth and Sixth Circuits, the City's interim promotional goals are a permissible means of speedily realizing the long term goals and, as the District Court's 1991 modification order clearly states, the interim goals terminate once the City attains the long-term goals.[8] Such a split in the circuit courts of appeal warrants review by this Court.

III. The Issue In This Case Warrants Review Because It Raises Important Public Issue Questions Regarding The Ability Of Public Employers To Adopt Affirmative Action Plans To Remedy Demonstrated Past Discrimination.

The tortured history of Birmingham employment litigation, which commenced over twenty years ago, establishes the imperative for this Court's intervention and disposition. As the Eleventh Circuit acknowledged, the operation of the civil service system, in effect, virtually precluded blacks from attaining positions at the City other than unskilled labor. The City's own efforts to utilize voluntary affirmative action in the middle '70's were largely illusory until the District Court ordered affirmative action in the referral of blacks for entry level police and fire positions.[9] Thereafter, after protracted

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[8] The City met and dissolved the challenged goal for Fire Lieutenant on February 25, 1989.

[9] Unfortunately, the Eleventh Circuit's conclusion that the City's pre-decree affirmative action efforts were efficacious is just wrong. 20 F.3d at 1546. The influx of blacks into the fire department resulted from the District Court's litigated order

negotiations with the United States, as well as the private plaintiffs, the City entered into a consent decree whose purpose was not only to remedy undeniable past employment discrimination but also to redirect City resources required to defend litigation brought by the Government to better and higher uses.

The remedies negotiated by the parties and approved by the District Court, were substantially those proffered by the Department of Justice. In its effort to resolve this litigation, following the lead of the Government, the City has become embroiled in a litigation labyrinth challenging the race- and gender-conscious remedies in its workforce. To a degree, these challenges thrive on the divergent judicial views about what is, or is not, permissible affirmative action for a public employer. As the District Court noted in its 1985 opinion, it sought, relying on a number of decisions, to synthesize the principles governing what is permissible for governmental employers trying to correct past discrimination. *In re Birmingham Reverse Discrimination Employment Litigation*, 39 Fair Empl. Prac. Cas. (BNA) 1431, 1432 (N.D. Ala. 1985). While the Court's subsequent analysis in *Croson* is helpful in trying to understand the law, *Croson* is not an employment case. This petition squarely presents an opportunity for this Court to provide guidance not only to the courts below, but also to the many local governments which continue to face these difficult issues. No

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directing the selective certification of blacks into entry level positions in police and fire. *Ensley Branch, NAACP v. Seibels*, 14 Fair Empl. Prac. Cas. (BNA) 670 (N.D.Ala. 1977).

local government should be forced to replicate the experience of the City of Birmingham.

The Jefferson County Personnel Board and the City of Birmingham engaged in systematic discrimination with respect to blacks and women in employment, and that is a stain on their history. However, it is unconscionable that the efforts, demonstrably in good faith, to remedy prior discrimination should itself have diverted public resources from other uses with superior calls upon the scarce public dollar. The Court should accept the challenge of defining the role of affirmative action within constitutional and statutory bounds.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgment of the Court of Appeals, and remand the case with directions to enter a judgment affirming the order of the District Court entered herein on August 14, 1992.

Respectfully submitted,

JAMES P. ALEXANDER
Counsel of Record

ANNE R. YUENGERT
BRADLEY, ARANT, ROSE & WHITE
2001 Park Place, Suite 1400
Birmingham, Alabama 35203-2736
(205) 521-8000

Counsel for Petitioners Richard Arrington, Jr. and The City of Birmingham

OF COUNSEL:

DEMETRIUS C. NEWTON
City Attorney
City of Birmingham
600 City Hall
Birmingham, Alabama 35203

JAMES WALKER MAY
ABDUL K. KALLON
BRADLEY, ARANT, ROSE & WHITE
2001 Park Place, Suite 1400
Birmingham, Alabama 35203-2736
(205) 521-8000

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6778

D. C. Docket Nos. CV84-P-00903-S, CV-82-P-00850-S
CV82-P-01852-S, CV83-P-02116-S
(Filed May 4, 1994)

IN RE:
BIRMINGHAM REVERSE DISCRIMINATION
EMPLOYMENT LITIGATION

JAMES A. BENNETT,

Plaintiff,

FLOYD E. CLICK; JAMES D. MORGAN;
JOEL ALAN DAY; GENE E. NORTHINGTON;
VINCENT JOSEPH VELLA; AND LANE L. DENARD,

Plaintiffs-Appellants,
Cross Appellees,

versus

RICHARD ARRINGTON, JR., as Mayor of
the City of Birmingham; CITY OF BIRMINGHAM;
JAMES B. JOHNSON; HENRY P. JOHNSTON;
and HIRAM Y. McKINNEY, as Members of the
Jefferson County Personnel Board; JOSEPH W.
CURTIN, as Director of the Jefferson
County Personnel Board; and JEFFERSON COUNTY
PERSONNEL BOARD,

Defendants-Appellees,

JOHN W. MARTIN, MAJOR FLORENCE, IDA McGRUDER, SAM COAR, EUGENE THOMAS, CHARLES HOWARD,

Defendants-Intervenors-Appellees-Cross Appellants,

UNITED STATES OF AMERICA,

Defendant-Intervenor-Appellee.

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association, and KENNETH O. WARE,

Plaintiffs-Appellants, Cross-Appellees,

GERALD L. JOHNSON; PHILLIP H. WHITLEY; DAVID H. WOODALL; DANNY R. LAUGHLIN; MARSHALL G. WHITSON; DUDLEY L. GREENWAY,

Plaintiffs,

versus

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON; HENRY P. JOHNSTON; and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; JEFFERSON COUNTY PERSONNEL BOARD; and THE UNITED STATES OF AMERICA,

Defendants-Appellees,

JOHN W. MARTIN, MAJOR FLORENCE,
IDA McGRUDER, SAM COAR, WANDA THOMAS,
EUGENE THOMAS and CHARLES HOWARD,

Defendants-Intervenors-Appellees.
Cross Appellants.

ROBERT K. WILKS; CARLICE E. PAYNE;
RONNIE J. CHAMBERS; JOHN E. GARVICH, JR.,
JAMES W. HENSON; ROBERT BRUCE MILLSAP,

Plaintiffs-Appellants,
Cross Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

HOWARD E. POPE, CHARLES E. CARLIN,

Plaintiffs-Intervenors-Appellants,

versus

HENRY P. JOHNSTON,

Defendant,

JOHN W. MARTIN, MAJOR FLORENCE,
IDA McGRUDER, SAM COAR, EUGENE THOMAS
and CHARLES HOWARD,

Defendants-Intervenors-
Appellees-Cross Appellants,

WANDA THOMAS,

Defendant-Intervenor.

Appeals from the United States District Court
for the Northern District of Alabama

(May 4, 1994)

Before EDMONDSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

BLACK, Circuit Judge:

In the latest chapter of this ongoing litigation we determine whether certain provisions of a 1981 consent decree mandating that the City of Birmingham (City) select employees for promotion based upon their race can withstand scrutiny under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. We hold that they cannot.[1]

I. Background

Appellants are fourteen male, non-black employees of the Birmingham fire rescue service (BFRS) and one male, non-black employee of the City engineering department.[2] Appellants assert that the City, acting pursuant to

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[1] We affirm without discussion the district court's holding that § 108 of the Civil Rights Act of 1991 is inapplicable because the conditions for application of that section, even if retroactive application is appropriate, are not present in this case.

[2] The engineering department employee has been included among the Appellants since the original trial of Appellants' case in 1985. No material aspect of the claims relating to the engineering department is discussed in the district court opinion that is the subject of this appeal. We will, therefore, confine our analysis to the claims raised regarding the BFRS. On remand, the district court should apply our analysis and holdings to all Plaintiffs with pending claims.

a consent decree it entered in 1981 to resolve then-pending litigation, violated their rights under Title VII and the Equal Protection Clause when it made promotion decisions based upon the race of the person to be promoted. To place the City's use of race in promoting candidates under the consent decree in context, we first review the pertinent events that led to the consent decree and brought us to this stage of the litigation.

A. Events Leading to the Consent Decree

In the mid-1970s, the United States, the Ensley Branch of the NAACP, and seven black individuals (Martin plaintiffs) sued the City and the Personnel Board of Jefferson County (Board) in three separate class actions. The suits charged that the City and the Board had unlawfully discriminated against blacks and women in their hiring and promotion decisions.[3] The district court consolidated the three original cases and held two trials. The first trial, in 1976, was held on the limited issue of the validity of the Board's screening tests for entry-level police and firefighter applicants. The district court found that the tests violated Title VII and ordered the Board to certify a number of black applicants for employment with the City. *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1494 & n.4 (11th Cir. 1987), *aff'd*

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[3] The Board and the City share responsibility for hiring and promoting City employees. The Board administers tests, tracks employee seniority points, and develops lists of certified candidates for various job openings within City government. When a job opening occurs, the Board certifies candidates it deems qualified for the position to the City and the appropriate City official selects a candidate from the Board-certified list. *See infra* part I.D.

sum nom Martin v. Wilks, 109 S. Ct. 2180 (1989) (*BRDEL I*). In 1979, the district court held a second trial on the validity of other testing and screening devices used by the Board. *Id.*

While awaiting the outcome of the second trial, the parties entered settlement negotiations. Eventually, two consent decrees resulted, one between the plaintiffs and the Board and the other between the plaintiffs and the City. The City's negotiation process was not without its puzzling aspects. As in any negotiation, the City and the United States exchanged proposals several times. The City initially proposed for itself a fixed quota of 35% across-the-board black appointments to all job openings in the City for five years. The United States, the party pressing the discrimination claim against the City, countered with a proposal that addresses certain job categories individually. With respect to BFRS promotions, the United States' response set a lower standard than that initially proposed by the City for promotions of blacks to the lieutenant ranks: it proposed promoting blacks from entry-level firefighter to fire lieutenant at a rate equal to two times the percentage of blacks in the entry-level position.[4] That is, because at that time blacks comprised

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[4] Throughout this opinion, we refer to the pyramid-type hierarchy of the BFRS as follows: firefighter is the entry-level position within the department; fire lieutenant is the first significant promotion level to which a firefighter might aspire; fire captain is the next promotion following service as a fire lieutenant; battalion chief is the position to which a fire captain might be promoted; and fire chief is the top officer within the BFRS. We mean by the term firefighter only those BFRS employees occupying entry-level positions. Firefighter does not include fire lieutenants, captains, and battalion chiefs.

9% of entry-level firefighters, blacks would receive 18%, not the City's proposed 35%, of all promotions to fire lieutenant. In response, the City accepted the two-times-representation language, but added for itself a more stringent minimum requirement of 25% black promotions in all job categories, regardless of black representation in the job classification immediately below the promotional job. Under the City's counter-proposal, then, blacks would receive 25%, rather than the United States' proposed 18%, of all promotions to fire lieutenant.

After additional negotiation and cross-submission of draft decrees, the City's attorneys presented a settlement proposal to the Birmingham City Council for approval.[5] The decree as it read when presented to the City Council set a long-term objective for the City to employ blacks in all jobs within the City in proportion to the representation of blacks in the surrounding Jefferson County labor market, which was 28% at the time. There was no fixed annual percentage for black promotions to fire lieutenant. Instead, the decree presented to the City Council mandated that two of the next four lieutenant promotions would be filled by blacks; thereafter, the City would promote

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[5] Testimony indicates that the Mayor called the City Council to a special meeting the day before its regularly scheduled meeting to hear a presentation by attorneys for the City regarding a proposed settlement. It is unclear from the record whether Council members were given copies of the draft consent decree at that meeting. It is clear that two City attorneys involved in the litigation and settlement negotiations discussed the general terms of the decree with the Council and recommended settlement as the preferred course over continuing to defend the City's record regarding employment opportunities for blacks and women.

blacks to lieutenant at two times the rate of black representation among firefighters.[6] The decree as presented also provided for back pay relief in an unspecified amount to individuals who were the victims of alleged past employment discrimination by the City.[7] The City

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[6] In 1981, when the decree was negotiated, approximately 9% of BFRS firefighters were black. This provision, therefore, meant that approximately 18% of annual promotions to lieutenant would be filled by blacks. The decree, however, also contained provisions designed to increase the number of black firefighters hired by the City. Therefore, as the percentage of black firefighters increased, the percentage of lieutenant promotions annually reserved for blacks would also increase.

[7] The record regarding back pay relief is somewhat confusing. At one stage in the negotiations, the United States was demanding that the City pay $500,000 in back pay relief to alleged victims of discrimination. The final decree provides for payment of $265,000 to settle all claims against the City. Whether the total amount of back pay relief to be provided by the City had been agreed upon when the decree was presented to the City Council is uncertain. Defense exhibit 39, the draft of the decree as it stood when the City Council met, contains a provision that "[t]he City agrees to pay the sum of $___ in full and complete settlement of the claims against the City of Birmingham for monetary relief of the blacks identified on Appendices___ and___ of this Decree." The Appellees maintain that attorneys for the City told the City Council that $265,000 would be paid to settle the claims.

James Baker, City Attorney when the decree was entered, testified at the 1991 trial. Baker's testimony indicates that the City Council approved a settlement sum of $265,000 when it passed Resolution 547-81. Baker testified on cross examination as follows:

> Q: And you prepared Resolution 547 which authorized entry into the consent decree?
>
> A: Yes, sir.

Council passed Resolution 547-81 at its regular meeting the following day, authorizing entry into the consent decree.

Resolution 547-81 notes that the parties had reached substantial agreement on the content of a consent decree designed to end the pending litigation. As we read the resolution, it authorized the City Attorney, with approval of the Mayor, to enter into a decree "embodying such terms" as those that were presented to the Council. Following passage of Resolution 547-81, negotiations continued and produced the final version of the decree, which was subsequently approved by the district court and is still in effect today.[8]

> Q: And did Resolution 547 talk about the amount of money or just the entry into the decree?
> A: My recollection is that - let me look at it an discuss the money because *the City would have not been able to settle this case without council approving that sum of money being paid.*
> Q: Well, *not only did the council approve the sum of money* but the council approved entry into the decree by Resolution 547?
> A: *It did. Yes.*

(Emphasis added.) Resolution 547-81, however, contains no reference to any sum of money to be appropriated for settlement. It simply authorizes the City Attorney, following consultation with the Mayor, to enter into a consent decree to settle pending litigation. We are unable to tell at what point the parties reached agreement on a dollar figure to settle outstanding claims. It is clear that no figure was approved in Resolution 547-81 and that the City desired to keep its financial obligations to a minimum.

[8] Certain aspects of the decree were modified by the district court in 1991. An appeal from the modification order is before another panel of this Court. *See Birmingham Firefighters v. Seibels*, 11th Cir., 1994, ___F.3d___(No. 91-7799).

In the final decree, the City did not admit to "any violation of law, executive order or regulation," but adopted the following plan to remedy past under-representation of blacks and women in City employment:

> In order to correct the effects of any underrepresentation of blacks and women in the City's workforce caused by any alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification in each department of the City of Birmingham in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census.

Decree ¶ 5. The final decree also sets a specific annual percentage for black promotions to fire lieutenant different from the one contained in the version presented to the City Council. Instead of setting black fire lieutenant promotions at two times the percentage of black firefighters, the final decree establishes that, each year, 50% of all promotions to lieutenant in the BFRS will be filled by qualified blacks. Decree ¶ 6. Under the decree, for every two lieutenant positions that come open, one must be filled by a black candidate, as long as there are qualified black applicants.[9]

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[9] The decree also provides that, subject to the availability of qualified black candidates, at least one of the next two captain vacancies in the BFRS would be filled by a black, with subsequent captain and battalion chief openings filled at the rate of two times the percentage representation of blacks in the job category from which captains and battalion chiefs are usually

The decree contains no termination date. Rather, it provides that the district court will retain jurisdiction over the decree and that, after the decree operates for a minimum of six years, any party may move to modify or dissolve it.[10]

Before giving its final approval to the decree, the district court held a hearing to consider objections of interested parties. *BRDEL I*, 833 F.2d at 1494. The Birmingham Firefighters Association filed objections and, along with two of its members, moved to intervene as of right in each of the three pending cases, contending that the proposed decree would adversely affect members' rights. *Id.* at 1495. The district court denied the motion to intervene and, on August 18, 1981, approved the decree. *Id.* The City has promoted fire lieutenants in the manner prescribed by the final decree since that time. *See infra* part I.D.

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drawn. Decree ¶ 8. It is unclear exactly how this provision was intended to work given that, at the time the decree was entered, there were no black lieutenants from which to select a black captain. Another provision of the decree, however, provides some insight: "Employees who have obtained permanent status as fire lieutenant or fire captain shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank." Decree ¶ 19b. This allows black firefighters to progress rapidly through the ranks of lieutenant and captain to battalion chief.

[10] A district court need not await a party's motion to terminate a consent decree over which the court retains supervisory jurisdiction. When the remedy prescribed in the consent decree is accomplished, the district court may *sua sponte* terminate the decree. *United States v. City of Miami*, 2 F.3d 1497, 1506 (11th Cir. 1993). The district court has not yet acted to terminate the City decree.

Following the denial of the motion to intervene, seven non-black male firefighters sought a preliminary injunction to enjoin operation of the decree, asserting that the promotion provisions would discriminate against them based upon their race, in violation of Title VII. The district court denied the injunction. The district court's refusal to permit intervention and its denial of the application for a preliminary injunction were consolidated on appeal to this Court. *Id.* We affirmed the denial of injunctive relief and dismissed the appeal of the denial of intervention, noting that the complaining firefighters would not be prejudiced by that denial because they could file a separate Title VII action against the City to address whatever harm they might suffer as a result of the operation of the decree. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983).

B. Post-decree History

The non-black male firefighters then brought suit in the district court against the City and the Board, under both the Equal Protection Clause and Title VII, charging reverse discrimination. They asserted that they were being denied promotions because of their race and that the City was promoting allegedly less qualified black firefighters to lieutenant solely on the basis of race, while claiming the City and Board consent decrees protected its actions from scrutiny. *BRDEL I,* 833 F.2d at 1495. The City and the Board admitted making " 'numerous race conscious promotion and employment decisions pursuant to [the City decree's] terms.'" *Id.* at 1496 (alteration in original). They contended that the plaintiffs, although not signatories, were bound by the City and Board decrees

and that the promotions in question were lawful because they were made pursuant to the decrees. *Id.*

In *BRDEL I* we noted that, when the non-black firefighters' claims were tried in 1985, the district court "treated the plaintiffs as if they were bound by the consent decrees and as if they were alleging solely that the City had violated [the terms of] the City decree." *Id.* As a result, the district court focused on whether the City had violated paragraph 2 of the decree, which provided that nothing in the decree required the City to promote a person who was less qualified " 'in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure.'" *Id.* at 1497. The issue tried in 1985 thus was whether the City had complied with the terms of the decree, not the legality of the consent decree itself.

The district court found that the City did not use a job-related selection procedure to evaluate candidates referred to it by the Board and that it had made no effort to develop any such procedure. *Id.* On appeal, we noted that this finding prevented the plaintiffs from establishing a violation of paragraph 2: "since the City did not use a job-related selection procedure, the court apparently reasoned, paragraph 2 imposed no obligations on it." *Id.* We held that the district court erred in finding the individual plaintiffs bound by the consent decree and remanded the case for trial on the merits of the claims of unlawful discrimination under Title VII and the Equal Protection Clause. *Id.* The Supreme Court affirmed. *Martin v. Wilks*, 109 S. Ct. 2180 (1989). Thus, in 1991, more than ten years after the City consent decree was entered, the district court held a trial on the Appellants' claim that the

City's use of race when making promotions in the BFRS violated both Title VII and the Equal Protection Clause.

C. The 1991 Trial

In *BRDEL I,* we perceived "no reason for treating a consent decree entered pursuant to a voluntary settlement differently from a voluntary affirmative action plan" and rejected "any notion that the memorialization of that voluntary undertaking in the form of a consent decree somehow provides the employer with extra protection against charges of illegal discrimination." *BRDEL I,* 833 F.2d at 1501 (footnote omitted).[11] We therefore instructed the district court on remand to treat the consent decree as a voluntary affirmative action plan and evaluate it under Title VII, using the analysis articulated in *Johnson v. Transportation Agency,* 107 S. Ct. 1442 (1987), and under the Equal Protection Clause using the analysis of *Wygant v. Jackson Board of Education,* 106 S. Ct. 1842 (1986). *Id.* at 1501 & n.23.

Noting that this case involved race-based employment decisions made by a government employer, the

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[11] *See also Local Number 93 v. City of Cleveland,* 106 S. Ct. 3063, 3072 (1986) (finding, for purposes of Title VII analysis, no need to distingish between an employer's actions taken pursuant to a consent decree and voluntary action taken outside the litigation context); *but see United States v. Paradise,* 107 S. Ct. 1053, 1078-79 (1987) (Stevens, J., concurring) (comparing the presumption against race-conscious decisionmaking a government must overcome when fashioning an affirmative action plan with the duty that a district court has to fashion a race-conscious remedy after finding a government guilty of racial discrimination and suggesting greater deference to the court ordered remedy).

district court recognized that it should apply a strict scrutiny review to the decree. *Bennett v. Arrington*, 806 F. Supp. 926, 928 (N.D. Ala. 1992); *see City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394, 1399 (11th Cir. 1991) ("In *Croson*, a majority of the Court finally agreed that the constitutionality of a state or local public minority preference program must satisfy a strict scrutiny standard."), *cert. denied*, 112 S. Ct. 969 (1992). The district court found that the City was justified in entering the decree because it had a strong basis in evidence for believing that it had discriminated against minorities in the past. *Bennett*, 806 F. Supp. at 928-29. The district court further found that the City's use of race under the decree was "limited and tailored to the relief necessary to overcome the employment effects of past discrimination by the City," while placing an "acceptable burden" on third parties like the Appellants. *Id.* at 929, 931. Accordingly, it denied the Appellants' claims. *Id.* at 931.

The district court did not separately evaluate Appellants' Title VII and Equal Protection Clause claims. Rather, it analyzed the City decree using the approach announced in *Johnson* a Title VII case and applied that analysis to all claims raised. We have previously recognized the struggle that district courts face in extracting guidance from the various multi-part Supreme Court opinions on the constitutionality of voluntary, government-sponsored affirmative action programs developed in various contexts. *See Peightal*, 940 F.2d at 1399 (noting the diversity of views expressed in Supreme Court

opinions leading up to *Croson*).[12] We believe, however, that in the interests of clarity our analysis must separately address Appellants' Title VII and Equal Protection claims. In order to assist our analysis, we first describe in greater detail the way in which the City uses race to determine candidates for promotion under the consent decree. Our understanding of the operation of the consent decree is informed by the City's brief on appeal and by the district court's findings of fact and conclusions of law entered at the close of the first trial on the Appellants' claims in 1985. *See In re Birmingham Reverse Discrimination Employment Litig.*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985).

D. Operation of the City Decree

When a City department has a vacancy in a job classification to be filled by promotion, it sends a "request for certification" of promotional candidates to the Board. *Id.* at 1438, ¶ 27. The City's personnel office reviews the request to determine whether the department

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[12] *See also* Mary C. Daly, *Some Runs, Some Hits, Some Errors – Keeping Score in the Affirmative Action Ballpark from Weber to Johnson*, 30 B.C. L. Rev. 1 (1988). Daly describes the opinions in the nine Supreme Court affirmative action cases preceding *Croson* as "lengthy, incohesive, contradictory, and ambiguous. . . . occupy[ing] over five hundred fifty-four pages in the official reporters and consist[ing] of forty-six majority, plurality, concurring, and dissenting opinions." *Id.* at 5. Daly notes further that "[e]ven within a single case, it is often impossible to discern the Court's holding because not every Justice in the majority will endorse the entire majority opinion" and frequently no majority opinion was produced at all. *Id.*

is in compliance with the City's affirmative action plan. *Id.* If the department is not in compliance, the request is stamped with a notation indicating that the City requests that the Board certify qualified blacks (or females) for the open position. *Id.*

The Board administers written promotional examinations and tracks employee seniority in City jobs. *Id.* ¶ 25. It grades promotional examinations, establishes a passing score, and calculates a converted score on a standardized scale for persons who pass an exam. *Id.* The Board then adds one point to each employee's converted score for each year of service with the City, up to a maximum of twenty years' service, to determine a final score. Employees of all races are then ranked on a single eligible register according to their final score. *Id.*[13]

The Board follows a "rule of three" when it supplies the City with names of candidates for promotional openings, providing a number of candidates equal to the number of openings plus two. *Id.* ¶ 27.[14] That is, if there is one opening, the Board provides three names; if there are four openings, the Board provides six names. If the City indicates on the request for certification that blacks are needed to meet the requirements of the decree, the Board reviews the eligible register and provides the necessary number of names on separate lists of black and

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[13] This necessarily means that an employee with less seniority must have a higher converted score than a more senior employee in order to attain a higher final score and a higher ranking on the eligible register.

[14] The "rule of three" was in effect at all times pertinent to this appeal.

non-black eligible candidates. Black candidates and non-black candidates are listed separately in the order in which they are ranked on the eligible register. *Id.* at 1437-38, ¶¶ 17, 27. For example, if the Board supplies names of four blacks and four non-blacks for promotional openings, the black list contains the fourth highest-ranked blacks on the eligible register and the non-black list contains the four highest-ranked non-blacks on the eligible register, regardless of how high or low they actually rank on the register relative to each other.

When the black and non-black candidate lists arrive in the BFRS, the Chief reviews the personnel files of the certified individuals and consults with the deputy chief about the candidates to determine whether any candidates are unqualified. *Id.* at 1437, ¶ 16. The Chief does not compare the relative qualifications of black and non-black candidates for promotion prior to making his selection from the lists. Nor does he compare the relative qualifications of the individuals certified as eligible against others of the same race certified on the same list. *Id.* This is because he believes he must promote the highest ranked individual on each list unless he can "prove that the highest ranked individual of either race is unqualified for the promotional position." *Id.* at 1437-38, ¶ 18. Therefore, he typically promotes in the order in which candidates appear on the respective lists. *Id.* at 1437, ¶ 16. The Chief alternates selections between the top name on the black list and the top name on the non-black list until all available openings are filled. *Id.* ¶ 17.[15]

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[15] This method was employed by the BFRS from the inception of the consent decree through 1988. In 1988, the BFRS began

Under this system, then, employees who will eventually fill an opening in the BFRS are pre-selected by race. If four fire lieutenant positions are open, two of those will be filled by blacks and two by non-blacks. Among employees certified by the Board as eligible candidates, promotions are awarded solely by race. No black employee ever competes for the two openings designated in advance to be filled by non-blacks. No non-black employee can compete for the two openings designated for blacks.

The impact of this system on the Appellants was such that, in the words of the district court:

> Each of the plaintiffs who complains in this litigation against the failure to be appointed as a fire lieutenant or fire captain or civil engineer[,] or who claims that he was delayed in such an appointment[,] was adversely affected because he was white. Those persons[,] in the absence of the consent decree and in the absence of any affirmative action plan adopted by the City as mandated by the decree would, as I interpret the evidence, have been appointed to the positions they desired and about which they here complain. Each of those individuals ranked higher on the certification list provided by the Personnel Board than the blacks who were appointed by the City pursuant to the consent decree.

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to use internal review panels to interview and evaluate the promotion candidates certified as eligible by the Board. This review panel system is not relevant to our inquiry because the City's actions about which Appellants here complain occurred before 1988 under the system described above.

Id. at 1433. Thus, the question we must determine here is whether an affirmative action plan that continuously segregates employees in this manner, and has the above-described impact on the promotional opportunities of employees who are not beneficiaries of its provisions, is permissible under both Title VII and the Equal Protection Clause.

II. Method of Analysis

The Supreme Court established in *Croson* that strict scrutiny is the standard of review to be applied to all claims of race-based discrimination by state government entities, regardless of the race of the complaining party. 109 S. Ct. at 722, 735-36. Accordingly, we apply strict scrutiny to the claims before us. Our analysis of the Appellants' claims, however, does not begin and end with *Croson*. Although informing [sic] our analysis, *Croson* is distinguishable from this case in at least two ways. First, *Croson* did not present a Title VII claim for review. Second, *Croson* did not involve race-based decisions made by a state governmental entity attempting to remedy its own history of prior employment discrimination.[16] Indeed, *Johnson*, a Title VII case, is more analogous

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[16] In *Croson*, a city attempted to remedy alleged discrimination in the construction industry by establishing minority business subcontractor set-asides for general contractors bidding on city construction projects. 109 S. Ct. at 713. The city was not attempting to develop a remedy for its own past discrimination. *Id.* at 724. This case, however, involves a city attempting to remedy under-representation of blacks and women that, the district court found, arose from the City's own previous discriminatory employment practices, the evidence of which was before the City when it acted.

to this case in some respects. *Johnson* notes that the obligations of a public employer under Title VII and the Constitution are not identical. 107 S. Ct. at 1449 n.6 ("The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution."); *id.* at 1452 ("[W]e do not regard as identical the constraints of Title VII and the Federal Constitution on voluntary adopted affirmative action plans."). Because this case presents both Title VII and Equal Protection Clause claims, we must reconcile the case law developed in both areas with the direction of a divided Supreme Court provided in *Croson*. To maintain clarity, we separately consider the City decree under both Title VII and the Equal Protection Clause.

III. Title VII Claim

Title VII reads in pertinent part:

> (a) It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ; or
>
> (2) to . . . classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .

42 U.S.C. § 2000e-2. It is now well established that employers may develop affirmative action plans designed to "further[ ] Title VII's purpose of eliminating the effects of discrimination in the workplace." *Johnson*, 107 S. Ct. at 1451.[17] An employer's decision to account for race in an affirmative action plan is "consistent with Title VII's objective of break[ing] down old patterns of racial segregation and hierarchy." *Id.* at 1450. Yet, an employer implementing a race-conscious affirmative action plan must assure that race will be considered "consistent with Title VII's purpose . . . and that the interests of those employees not benefiting from the plan will not be unduly infringed." *Id.* at 1452.

Determining whether the affirmative action plan embodied in the City decree was implemented consistent with Title VII's purpose and without unduly infringing the interests of Appellants involves a two-part test. We must first determine whether the City's consideration of the race of promotional candidates was justified by a

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[17] *See also United Steelworkers v. Weber*, 99 S. Ct. 2721, 2728 (1979) (observing, in a case involving a private employer, that "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long, constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy") (citation omitted); *id.* at 2726 (noting the " 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers' " (quoting *Holy Trinity Church v. United States*, 12 S. Ct. 511, 512 (1892)).

manifest racial imbalance that reflected under-representation of blacks in traditionally segregated job categories. *Id.* If such a justification was present when the plan was developed, we must then determine whether the plan itself provides a proper remedy for that imbalance. A remedy is proper if the plan does not unnecessarily trammel the rights of non-black employees or create an absolute bar to their advancement. *Id.* at 1455.

A. Justification – Manifest Racial Imbalance

When a job requires no special expertise, determining whether a manifest imbalance exists that would justify race-conscious decisionmaking by the employer involves a comparison of the percentage of minority employees in that job with the percentage of minorities in the general area labor market. *Id.* at 1452. When a job requires special skills or training, however, the appropriate comparison is to those in the labor market who possess that special skill or training. *Id.; see also United States v. City of Miami*, 2 F.3d 1497, 1509 (11th Cir. 1993) ("It is well established that, in determining whether there is a work force imbalance that justifies affirmative action remedies, the proper comparison is between the minority composition of the work force in question and the *qualified* minority population in the relevant labor market.").

This case presents for review those aspects of the City plan relating to promotions of firefighters to fire lieutenant in the BFRS. Training and experience as a firefighter are special skills required of those who would become fire lieutenants. As such, to determine if an

imbalance existed that would justify race-conscious promotion decisions by the City, the appropriate comparison is between black representation in the BFRS lieutenant ranks and black representation among entry-level firefighters. *See Stuart v. Roache*, 951 F.2d 446, 450-51 (1st Cir. 1991) (comparing percentage of minorities in sergeant rank with percentage of minorities in the rank immediately below having years of service necessary to become sergeants), *cert. denied*, 112 S. Ct. 1948 (1992).[18]

This comparison is consistent with the comparison used in *Johnson*, where the Supreme Court addressed a Title VII challenge to an affirmative action plan developed by a county transportation agency (agency). Johnson, a male, brought suit after Joyce, a female, was promoted to road dispatcher instead of him. Joyce and Johnson were among seven applicants certified as eligible

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[18] We address only the promotion provisions of the City plan in this appeal. Promotions, by their very nature, involve elevating a current employee to a higher position. Status as a department employee, therefore, is a prerequisite to promotion within a City department. Simply put, an employee must first be a firefighter before becoming a fire lieutenant, a fire lieutenant before becoming a captain, and so forth.

Under the terms of the decree, the City cannot require a firefighter to serve longer than two years in that position before becoming eligible to take a promotional exam for fire lieutenant. Decree ¶ 19b. Further, the decree specifically removes all length of service and time-in-grade requirements for promotions to captain or above. *Id.* So, fire lieutenants promoted under the decree must have a minimum of two years' experience as a firefighter, but there is no minimum experience as a lieutenant required to become a captain, or as a captain in order to become a battalion chief.

for selection after the initial round of applicant interviews. Three agency supervisors conducted a second round of interviews and recommended Johnson for the position. The agency's affirmative action coordinator, however, acting under a duty to keep the agency's director informed of opportunities for the agency to accomplish its objectives under its affirmative action plan, recommended to the director that Joyce be promoted. The director heeded the coordinator's recommendation and selected Joyce over Johnson.

The agency in *Johnson* had developed an affirmative action plan that authorized it to consider as one factor the sex of a qualified applicant when making promotions within a traditionally segregated job classification where women were significantly under-represented. The agency adopted its plan believing "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons" in the agency's work force. *Johnson*, 107 S. Ct. at 1446.

The Supreme Court observed without comment that the agency plan adopted as a long-term objective achieving an agency workforce that mirrored in each major job classification the percentage of women in the area labor market. *Id.* at 1453. "Even as it did so, however, the Agency acknowledged that such a figure could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories." *Id.* Therefore, the agency developed short-term goals for placing women in certain positions, not to be construed "as quotas that must be met, but as reasonable aspirations in

correcting the imbalance in the Agency's work force." *Id.* The Court noted that the agency plan did not "dictate mere blind hiring by the numbers [or] hold supervisors to achievement of a particular percentage of minority employment . . . regardless of circumstances such as economic conditions or the number of available qualified minority applicants."[19] *Id.* Under the plan, women competed directly with all other qualified applicants: "*[n]o* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Id.* at 1455. The plan "posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard." *Id.* at 1454.

The agency plan recognized that women were severely under-represented in the skilled craft job category, the category that included the road dispatcher position Johnson desired. In fact, there were no women among the 238 workers in that category. The Court noted that, with this type of imbalance in a category, and given the agency's desire to eliminate such imbalances, it was reasonable to consider Joyce's sex as one factor among many in the promotion decision. *Id.* at 1454. Thus, Joyce's

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[19] The Court noted that the agency director testified that Joyce's sex was only one of numerous factors he considered in reaching the decision to promote her instead of Johnson. The Court likened the agency plan to the "Harvard Plan" approvingly discussed by Justice Powell in *Regents of University of California v. Bakke*, 98 S. Ct. 2733, 2761-63 (1978) (approving consideration of an applicant's race in a college admission program as a plus in the applicant's favor while not insulating the applicant from comparison with all other candidates for admission).

promotion satisfied the first element for Title VII scrutiny because it was made under an affirmative action plan designed to remove imbalances that existed in traditionally segregated job categories. *Id.* at 1455.

1. *Findings of Manifest Racial Imbalance Required.* As a preliminary matter, we must first determine what effect the Court's opinion in *Croson* has on *Johnson's* requirement that a manifest racial imbalance must exist before a government entity can use race as a criteria in its employment decisions. Appellants assert that, in order for this Court to determine the validity of the decree and avoid the danger that its provisions were simply acts of racial politics rather than proper remedies for past discrimination, the City is required under *Croson* to have made particularized findings of its own past discrimination prior to entering the decree. Appellants maintain that when the City approved entry into the decree it made no such finding, and they claim that the lack of a formal finding of past discrimination by the City causes its decree to fail.

On the surface, Appellants' position is supported to an extent by the plain language of the decree itself. The decree, in typical settlement agreement language, specifically provides that the City admits to no "violation of law, executive order or regulations," but goes on to provide a remedy for its "alleged prior discriminatory employment practices." In essence, the City, speaking through the decree, refuses to admit that it has discriminated in the past while setting about to remedy the discrimination its adversaries in litigation asserted to have actually occurred. Nonetheless, we believe that in these circumstances the City was not required to make

formal findings about its own past discrimination – it merely had to have a strong basis in evidence, as we demonstrate below.

Our application of the *Johnson* manifest imbalance test here is informed by *Croson's* discussion of the necessity for a government entity to identify with specificity the discrimination it seeks to remedy through race conscious measures. *See generally Croson,* 109 S. Ct. at 721-28. The Supreme Court has recognized that "[e]videntiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Wygant v. Jackson Bd. of Educ.,* 106 S. Ct. 1842, 1849 (1986). There must be sufficient evidence to allow a trial court to "make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* Unless such a finding is made, an appellate court has no basis upon which to determine whether race-based action was justified as a remedy for prior discrimination by the City. *Id.*

Appellants' assertion that *Croson* requires the City to have made specific findings of its own past discrimination before entering the consent decree ignores one of the important differences between *Croson* and this case. In *Croson,* the city was not acting to remedy its own history of discrimination, but was acting to remedy discrimination it claimed had occurred in private industry. The Court found the city council's justifications for the use of race to be "an amorphous claim that there has been past discrimination in a particular industry [that] cannot justify the use of an unyielding racial quota." *Croson,* 109 S. Ct. at 724. It makes a great deal of sense to require a

city to describe with particularity the findings that led it to conclude that an entire industry had engaged in discrimination before setting about to fashion a race-conscious remedy for that perceived problem. The circumstances of this case, however, do not compel a similar requirement. *See Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.").

We do not read *Croson* to require that a city settling litigation by consent decree declare *itself* to have violated the law by discriminating in employment, detailing the elements of a potential plaintiff's complaint in the process, before adopting an affirmative action plan designed to remedy the effects of is own past discrimination. *See Croson*, 109 S. Ct. at 724-28; *cf. Cone Corp. v. Hillsborough County*, 908 F.2d 908, 913 (11th Cir.) (noting that the *Croson* plurality intimated that local governments could enact race-conscious remedies "to redress clear instances of discrimination"), *cert. denied*, 111 S. Ct. 516 (1990). It is, however, a necessity that some finding be made that the City engaged in past discrimination, in order to allow for proper judicial review of the City's use of race in its affirmative action plan. *See Wygant*, 106 S.Ct. at 1849 & n.5. (if "race-based state action is taken to remedy prior discrimination by the governmental unit involved . . . the very nature of appellate review requires that a factfinder

determine whether the employer was justified in instituting a remedial plan"). In this case, the necessary finding of past discrimination was provided by the district court.

In the opinion from which this appeal arises, the district court found that there was a strong basis in evidence that the City had discriminated against blacks prior to implementing the affirmative action plan embodied in the consent decree. *Bennett* 806 F. Supp. at 929. It noted that blacks were not represented at all in the BFRS lieutenant ranks as a direct result of discriminatory testing for entry-level positions. *Id.* Further, it noted that there was a significant imbalance between the number of black lieutenants and the number of black firefighters, the jobs from which lieutenants were typically drawn. *Id.* at 930. At the conclusion of the 1985 trial, the district court found significant evidence of discrimination prior to the time the City entered into the decree. *Id.* Additional evidence presented in the 1991 trial confirmed those findings. *Id.* The district court also noted that, at the time the decree was adopted, it had already found certain tests administered by the Board to have an adverse impact on blacks and to be insufficiently job related to be valid under Title VII. *Id.* at 929. Finally, the district court found that the City entered into the consent decree only when faced with the imminence of another adverse decision by the district court related to "a further trial, with voluminous evidence, attacking scores of other tests and selection devices . . . as having a similar adverse impact and insufficient job-relatedness." *Id.* As a result, the district court found that the City was justified in using race to remedy its prior discrimination. *Id.* We conclude that

these findings satisfy *Croson* and permit thorough appellate review.

2. Sufficiency of the Findings and Conclusions of Law. We review the district court's factual findings under the clearly erroneous standard. *Newell v. Prudential Ins. Co.*, 904 F.2d 644, 649 (11th Cir. 1990). The district court's legal conclusions are subject to *de novo* review. *Id.*

The district court found that when the City decree was entered in 1981 there were 453 firefighters in the BFRS, 42 of whom were black. *Bennett*, 806 F. Supp. at 930 n.6. There were also 94 lieutenants, 31 captains, and 15 battalion chiefs, none of whom were black. *Id.* Further, the district court had already found that tests administered by the Board for entry-level City jobs in both the police and fire departments were invalid under Title VII because they had a significant adverse impact on blacks and were not sufficiently job related. *Id.* at 929 (citing *Ensley Branch, NAACP v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied*, 101 S. Ct. 783 (1980)). The district court found that, against this background, coupled with the advice of counsel that the likelihood of victory in the pending litigation was poor, the City was justified in adopting an affirmative action plan. The parties do not dispute these findings, and we do not hold them to be clearly erroneous.

While the Court in *Croson* criticized the findings made there for only supporting amorphous and generalized claims of societal discrimination, 109 S. Ct. at 724, the findings by the district court here demonstrate that the City had strong evidence before it to believe it had engaged in past racial discrimination when it entered the

consent decree. The City was aware that the district court had disapproved the hiring tests used by the Board because they had an adverse impact on blacks. The City knew, through counsel, that voluminous evidence attacking other employment tests and selection procedures had been introduced in pending litigation and was advised by counsel that settlement would be a preferred alternative to another adverse decision. The City also knew of the gross statistical disparity between the number of blacks it employed as firefighters and as officers in the BFRS. Given these facts as determined by the district court, the City was justified in implementing an affirmative action plan that provided for the use of race as a remedy for past discrimination. Therefore, the City's affirmative action plan satisfies the first element of the two-part test established in *Johnson*. We next consider whether the specific provisions of the City decree provide a proper remedy to address the identified imbalances in traditionally segregated job categories.

B. Remedy – Unnecessarily Trammeling Rights of Non-black Employees

This element of the *Johnson* test necessarily involves balancing the use of race to secure opportunities for blacks in traditionally segregated jobs against the impact of the plan on non-blacks. As we stated earlier, a proper remedy cannot unnecessarily trammel the rights of non-black employees or create an absolute bar to their advancement. *Johnson* 107 S. Ct. at 1455. On its face, the decree does not create an absolute bar to advancement for non-black employees because it sets aside a fixed percentage

of promotions for blacks, leaving the remainder to be filled by all other employees. Our inquiry is thus confined to whether the decree provisions unnecessarily trammel the rights of the non-black employees who do not benefit from the plan.

Unlike the affirmative action plan approved in *Johnson*, the City decree does not use race as one factor among several that could be considered when making promotion decisions. Rather, the decree makes a Board-certified firefighter's race the sole factor used to determine eligibility for all fire lieutenant promotions in the BFRS. Promotion-eligible employees are listed separately by race and promotions are made from those separate lists to fill openings allocated by race. The decree, therefore, embodies exactly the sort of "danger that personnel decisions would be made by reflexive adherence to a numerical standard" the Court cautioned against in *Johnson*. 107 S. Ct. at 1454. Unlike the plan approved in *Johnson* in which "*[n]o* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants," *id.* at 1455, the City decree specifically excludes all non-black firefighters from consideration for one-half of all fire lieutenant promotions and all black firefighters from consideration for the other half of lieutenant promotions, based solely on their race. And, unlike the plan approved in *Johnson* the City's annual fire lieutenant promotion quota is not a "reasonable aspiration" designed to correct the imbalance in the City's workforce without unnecessarily trammeling the rights of the Appellants. It is, instead, a racial quota that must be met whenever openings occur.

There is no precise formula for determining whether an affirmative action plan unnecessarily trammels the rights of non-beneficiaries. When reviewing affirmative action plans involving race based entry-level hiring goals, the Supreme Court has noted that the impact of the use of race on non-beneficiaries is diffused, spread across all those in society who might desire the entry-level position. *See, e.g., Wygant,* 106 S. Ct. at 1851. Entry-level hiring goals, while burdening some innocent persons, do not impose the same type of injury on non-beneficiaries as that imposed by the use of race to determine employee layoffs. *Id.* "[L]ayoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Id.* at 1852. The Supreme Court has determined that the burden imposed through race-based layoffs is too intrusive. *Id.*

This case involves neither hirings nor layoffs, but instead concerns promotions made under the City's affirmative action plan. We view the promotion situation as lying somewhere between entry-level hiring and layoffs in terms of the burden permitted on non-beneficiaries. The burden imposed by the City's plan on non-beneficiaries in the promotion context is not widely diffused like the burden imposed in a hiring situation. It resembles layoffs in that only specific persons are burdened – those who can reasonably aspire to promotions within the BFRS because they are already employed there and are qualified for promotion. When race is used under the City's affirmative action plan to determine promotions, it is the non-black employees excluded from consideration for half of all promotion opportunities, and not society in general, who bear the entire burden of the remedy for the City's past discriminatory

behavior. On the other hand, failure to receive a promotion is not as serious a disruption in an employee's life as that caused by an impermissible race based layoff program. In determining whether the City's plan unnecessarily trammels the rights of non-black employees, our analysis necessarily recognizes the difference in impact between hiring, layoff, and promotion provisions in affirmative action plans.

Appellees assert that no Supreme Court case dealing with affirmative action hiring and promotion goals has ever found unnecessary trammeling where the plan did not require firings or layoffs of nonminority employees. In effect, Appellees would have us read part two of the *Johnson* test to say that any affirmative action plan that does not require firings or layoffs of nonminority employees or create an absolute bar to their advancement passes scrutiny under Title VII. We are unwilling to define "unnecessary trammeling" as nothing short of firings and layoffs; an affirmative action plan can *unnecessarily* trammel the rights of non-minority employees without requiring firings or layoffs. Such is the case with the promotion provisions of the City's affirmative action plan under review here.

When the plan was created, the City employed 42 black firefighters and 411 non-black firefighters. The decree set aside half of all future promotions to fire lieutenant for those among the 42 black firefighters who became Board-certified as eligible. By virtue of the rigid manner in which the City has used race to determine promotions under the decree, *see supra* part I.D., 42 black firefighters, because of their race, gained an exclusive claim to half of all fire lieutenant promotions made under the plan, but lost any possibility of competing for the

other half. On the other hand, the remaining 411 non-black firefighters saw the number of promotions to which they might aspire, absent the consideration of their race, cut from 100% to half of all lieutenant promotions. The 50% promotion quota was to continue for the duration of the decree, subject to future modification, without regard to the number of lieutenant openings in any given year, the number of black firefighters eligible to become lieutenants at any particular time, or any factor other than race. As the decree operates, no non-black firefighter can even be considered for a promotional job reserved for blacks unless no blacks remain on the Board's eligible register.

We discern no legitimate basis for the 50% figure ultimately chosen for the annual fire lieutenant promotion quota. The 50% figure selected is completely uninfluenced by the percentage representation of blacks in the firefighter ranks, the feeder job from which lieutenant promotions are filled. The 50% figure appears entirely arbitrary, set at 50% through the settlement bargaining process after the parties failed to agree on the initially proposed 35%, or the subsequently proposed 25%, or on any other arbitrary figure that might have been proposed as the decree was developed by the attorneys for various involved parties.

In our view, the City decree fails under Title VII because the indefinitely-lasting, arbitrarily-selected 50% figure of annual black promotions to fire lieutenant unnecessarily trammels the rights of non-black firefighters by unduly restricting their promotional opportunities through establishment of an arbitrary fixed quota. Had the promotion figure been tied in some reasonable

manner to the percentage of blacks in the firefighter ranks, significantly more non-black employees would have received promotions to fire lieutenant. The district court determined in 1985 that the Appellants, absent the consent decree, "would . . . have been appointed to the positions they desired and about which they here complain." 39 Fair Emp. Prac. Cas. (BNA) at 1433. The failure to be promoted, caused by the arbitrarily selected 50% promotion figure, no doubt impacted the earnings of Appellants, who are likely heavily dependent on wages for their day-to-day living. *See Wygant,* 106 S. Ct. at 1851. The failure to be promoted, or even a delay in receiving a promotion, also likely impacts earnings long into the future under whatever retirement program the City provides for BFRS employees.

It bears repeating that this case does not involve entry-level affirmative action where the impact of race-based decisionmaking for remedial purposes is minimized as it is spread across society as a whole; we decide nothing about that kind of affirmative action. Because non-black firefighters bear the entire burden of the race-based fire lieutenant promotion remedy in the decree, and because of the immediate and future ramifications of that burden, it is imperative that the remedy be related in some reasonable manner to the representation of blacks among firefighters. We see no such relationship in this case. We recognize that a governmental entity should take immediate steps to remedy its history of discrimination by awarding victims of that discrimination their rightfully earned promotions. *See Howard v. McLucas,* 871 F.2d 1000, 1003 & n.5 (11th Cir.) (approving consent decree providing back pay relief and 240 promotions to

black civilian Air Force Base employees into "most likely jobs lost by blacks" due to discrimination), *cert. denied* 110 S. Ct. 560 (1989). It is not permissible, however, for a government to implement a rigid quota of race-based promotions, to continue indefinitely, with no basis at all for the quota figure selected.

Our review has located no cases approving a state government affirmative action plan where the promotion remedy was not tied in some manner to the representation of minorities in the pool of candidates for promotion. *See, e.g., Wilson v. Bailey,* 934 F.2d 301, 303 (11th Cir. 1991) (approving, in a case involving some of the same parties present in this litigation, use of race as one factor among many considered when consent decree called for promotion of blacks and females to certain jobs at rates "at least equivalent to their percentage representation in the applicant pool from which such promotions are made"); *Davis v. City of San Francisco,* 890 F. 2d 1438, 1449 (9th Cir. 1989) (approving consent decree providing preferential promotions for minorities based on the percentage of minorities in the relevant labor force), *cert. denied* 111 S. Ct. 248 (1990). Indeed, within the City decree itself there are examples of promotion provisions that are tied to the representation of blacks in the feeder job category. There is no legitimate reason for the annual fire lieutenant promotion figure to be completely unrelated to the population of black firefighters.

Promotional remedies for past discrimination using percentages not tied to the percentage of minorities in the job immediately below the promotion position have withstood scrutiny only when ordered by a court to combat a state government's steadfast refusal to obey that court's

long-standing order to develop non-discriminatory promotion procedures. *See United States v. Paradise*, 107 S. Ct. 1053, 1063 (1987) (upholding district court order mandating 50% black representation in next group to be promoted to state trooper corporal to provide relief for state's failure to develop acceptable promotion procedures eleven years after first ordered to do so by the district court). This, however, is not a case like *Paradise*, where the district court ordered a remedy to combat an egregious refusal to follow its prior orders to end discriminatory practices. This is a case where, to end pending litigation, the City voluntarily entered into a consent decree containing a quota-based affirmative action plan that cannot withstand scrutiny.

We hold that the fire lieutenant promotion provision of the City's affirmative action plan violates Title VII because it unnecessarily trammels the rights of non-black firefighters by establishing a rigid, arbitrarily selected quota of 50% annual black promotions to fire lieutenant.

IV. Equal Protection Clause Claim

We turn next to Appellants' Equal Protection Clause challenge to the City's affirmative action plan. Appellants assert that they were denied promotions to fire lieutenant because of their race in violation of the Equal Protection Clause.[20] Appellees maintain that the use of race in

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[20] The Equal Protection Clause provides, in relevant part, that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

determining fire lieutenant promotions should survive an equal protection challenge because the City had a compelling interest in adopting the decree and the provisions of the decree are narrowly tailored to achieve that interest.

" 'Racialand [sic] ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.' " *Wygant*, 106 S. Ct. at 1846 (quoting *Bakke*, 98 S. Ct. at 2748). This strict scrutiny is employed even though the racial classification challenged operates against a group not historically subject to discrimination by government. *Id.; see also Croson*, 109 S. Ct. at 722 ("We thus reaffirm the view . . . that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."). To assure a proper balance between the individual rights secured by the Fourteenth Amendment and the permissible burden placed on innocent persons, the use of race in government decisionmaking is subject to strict judicial scrutiny "to 'smokeout' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Croson*, 109 S. Ct. at 721.

To survive a challenge under the Equal Protection Clause, the City's use of race in making fire lieutenant promotion decisions must be justified by a compelling interest and must be narrowly tailored to achieve that interest. *See Wygant*, 106 S. Ct. at 1847; *Cone Corp.*, 908 F.2d at 913 ("Under strict scrutiny analysis, the racial classifications must be necessary and must be narrowly tailored to achieve the goal of remedying the effects of

past discrimination."). The City must show that a compelling governmental purpose justified the use of a racial preference and that the means chosen – in this case, the selection of candidates for promotions solely because of their race – was narrowly tailored to achieve that purpose. *See Hayes v. North State Law Enforcement Officer Ass'n*, 10 F.3d 207, 212-13 (4th Cir. 1993). For the reasons set forth below, we hold that the City had a compelling interest in providing a remedy for its prior discriminatory employment practices, but that the City's use of race in its affirmative action plan is not narrowly tailored to achieve that interest as required under the Equal Protection Clause.

A. Compelling Government Interest

Public employers operate under a clear command from the Supreme Court to eliminate the vestiges of prior racial segregation and discrimination. *Wygant*, 106 S. Ct. at 1848. At the same time, public employers must " 'do-away with all governmentally imposed discriminations based on race.' " *Id.* (quoting *Palmore v. Sidoti*, 104 S. Ct. 1879, 1881-82 (1984)). The Supreme Court has noted that these two commands must be reconciled with great care, because they are not always harmonious. *Id.* That is, while attempting to eliminate the vestiges of past discrimination against persons of one race, government must minimize the imposition of new discriminations on persons of other races. Therefore, the Court requires a showing that the governmental unit involved engaged in prior discrimination, and requires a strong basis in evidence that remedial action is warranted, before allowing that governmental unit to execute an affirmative action

plan remedying prior discrimination by using race in a narrowly tailored manner. *Croson*, 109 S. Ct. at 725.

As an initial matter, then, we must decide whether there was a strong basis in evidence that remedial action was warranted before the City entered the consent decree embodying its affirmative action plan.[21] As noted previously, the district court found strong evidence that the City had engaged in prior discrimination in the BFRS. *See supra* part III.A.2. We accept the district court's findings and will not repeat them here. We also accept the district court's findings and conclusion that action to remedy the effects of prior discrimination in the BFRS was warranted. But even when a city is justified in implementing an affirmative action plan, only a plan that is "carefully constructed" will do. *See Wygant*, 106 S. Ct. at 1853 (O'Connor, J., concurring) ("The Court is in agreement that . . . remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.").

B. Narrowly Tailored Means

Classifications based upon race carry a very real danger of harm because they "threaten to stigmatize individuals by reason of their membership in a racial group." *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993). "[E]ven in the

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[21] We discussed above and rejected Appellants' assertion that, under *Croson*, the City was required to articulate specific findings of its past discrimination before entering the consent decree. *See supra* part III.A.1.

pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs." *United Jewish Orgs., Inc. v. Carey*, 97 S. Ct. 996, 1014 (1977) (Brennan, J., concurring in part and dissenting in part). Preferences based on race "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Bakke*, 98 S. Ct. at 2752. As a result, a race conscious government policy justified by a compelling purpose – remedying past racial discrimination – must also use race in as limited a manner as possible to accomplish that compelling purpose.

Several factors determine whether race-based promotional relief is narrowly tailored to accomplish a compelling purpose, including: "the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions, the relationship of numerical goals to the relevant labor market, and the impact of the relief on the rights of [the Appellants]." *Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir.) (internal quotations omitted), *cert. denied*, 110 S. Ct. 560 (1989). We address each of these in turn.

1. *Necessity for the Relief Granted and Efficacy of Alternative Remedies.* In *Howard*, we explored in detail the provisions of a consent decree using race to provide relief to victims of past discrimination by a government employer. The consent decree provided promotions for

240 specified plaintiffs who likely were previously denied promotions because of their race. The decree identified 38 target positions, based upon historical career progression patterns, to determine the jobs most likely lost by the plaintiffs and limited the race-conscious promotions to those positions. *Id.* at 1003. The 240 discrimination victims were listed on special promotion registers and alternated with persons on a general promotion register to fill openings as they occurred in each of the 38 target positions. *Id.* at 1008. In reviewing a challenge to the decree, we rejected the argument that promotional relief was unnecessary because other alternatives were available. *Id.* at 1009. We found that the proposed alternatives were not feasible because they did not place the plaintiffs, who were identified victims of prior discrimination, in their rightful place as expeditiously as did the relief contained in the decree. *Id.*

Where relief is not provided to identified victims of discrimination, given the odious nature of race-based decisionmaking, race-neutral alternatives should be considered before a government implements an affirmative action plan using race as the sole criteria upon which promotions are based. *See Croson,* 109 S. Ct. at 729 (faulting the city for failing to consider the use of race-neutral means to increase minority business participation in city contracting); *Paradise,* 107 S. Ct. at 1066 (describing the need to consider the efficacy of alternative remedies when determining whether race-conscious remedies are appropriate). In examining this requirement in this case, the district court found that the City "did attempt to correct its past discrimination in or around 1974, prior to the entry of the consent decree" in 1981. *Bennett,* 806 F.

Supp. at 929. The district court noted that an affirmative action ordinance designed to increase minority hiring by the City was enacted by the City Council in 1974, but was later vetoed by the Mayor. *Id.* at 929-30. The district court also noted that a subsequent measure was enacted which placed responsibility on various department heads to set and achieve minority employment goals. *Id.* at 930. The district court found that "[t]hese alternative measures were not effective, as evidenced by the hiring of only two blacks in the Fire Department by 1974" and by the fact that, as of the month before the consent decree was formally entered in 1981, "only 9.3% of the firefighters were black." *Id.*

The district court's finding that alternative measures to the race-based promotion plan in the City decree were not effective is clearly erroneous. First, the fact that only two blacks were hired in the BFRS by 1974 has no bearing on the effectiveness of affirmative action efforts implemented after 1974. Second, post-1974 hiring data indicate that the City had made significant progress in adding blacks to the firefighter ranks prior to entering the consent decree.[22] The effectiveness of the City's pre-decree efforts in hiring blacks as firefighters appears in the chart below:

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[22] We are unable to determine from the record how much of this progress to attribute to the effect of the City Council measure ordering department heads to set and achieve minority employment goals and how much to attribute to the curative measures the district court ordered the Board to take after finding that its entry-level tests had an adverse impact on blacks. We presume that the two worked in concert.

Year	Black Fire-fighters	Non-Black Fire-fighters	Total Fire-fighters	Percent Black
1974	2	n/a	n/a	n/a
1978	8	429	437	1.89%
1981	42	411	453	9.3%

As the chart demonstrates, between 1978 and 1981, the City increased the number of black firefighters from eight to forty-two – a five-fold increase that was achieved in the absence of the race-based affirmative action plan embodied in the consent decree. We regard this progress as encouraging not ineffective. Unlike the situation in *Croson,* where there was no evidence in the record that the city had even considered alternatives to race-based quotas, *Croson,* 109 S. Ct. at 729, there is strong evidence in the record of this case that the City had implemented effective alternatives to race-based quotas to remedy its prior discriminatory behavior. While the district court correctly concluded that, when the decree was entered, no black had as yet become a fire lieutenant, we believe that, given the City's progress at the entry-level, alternative measures designed to increase black representation in the fire lieutenant ranks were feasible.

Appellants suggest several feasible alternatives to the race-based promotion remedy implemented by the City that could have made a significant difference in the representation of blacks among fire lieutenants. For example, Appellants propose eliminating the addition of seniority points to the test score when determining the final score that dictates an employees' place on the eligible register. *See supra* part I.D. This race-neutral alternative would

prevent non-black firefighters from benefiting in the promotion context from the City's prior discrimination against blacks in entry-level hiring. The non-black status quo in the fire lieutenant ranks would not be preserved as a result of a seniority system that is a vestige of the City's prior discrimination against blacks. Under such a system, recently-hired blacks who score higher on promotion exams than more senior non-blacks would rank higher on the eligibility register and be promoted sooner than their lower ranking but more senior non-black co-workers. Appellants also suggest that, if the Board's promotion exams had an adverse impact on blacks, a race-neutral alternative to those exams would be implementation of another test that has no such adverse impact. In addition, we note that the City could have implemented an affirmative action plan, like the one approved in *Johnson*, that accounted for the race of a candidate as one factor among many to be considered. The record indicates that, in spite of its progress at the entry level, the City considered no feasible alternatives to the race-based promotional quota system for fire lieutenants before it implemented this system as a remedy for prior discrimination. Considering the efficacy of alternative remedies, the relief provided in the decree cannot be reconciled with the requirement that a government's use of race must be narrowly tailored.

2. *Flexibility and Duration of Race-Based Relief.* In *Howard*, we identified several aspects of the consent decree that readily demonstrated its flexibility, short duration, and minimal adverse effects on non-beneficiaries. *Howard*, 871 F.2d at 1009. First, the *Howard* decree did not prevent non-black employees from being promoted because promotions to the target positions from

the special promotion roster alternated with those from the general roster, while leaving most positions to be filled by open competition. *Id.* Second, the plaintiffs had to meet certain qualification criteria in order to be promoted. *Id.* Third, the government was not required to make unnecessary promotions simply for the sake of providing relief to the plaintiffs. *Id.* Fourth, the relief was not intended "to set employment percentage goals or ensure a racially balanced workforce, and it evaporate[d] when the 240 promotions [were] made." *Id.* A comparison of the decree we approved in *Howard* with the City decree in this case reveals some similarities, but some more significant differences.

Like the *Howard* decree, the City decree does not require unnecessary promotions in providing relief. The City decree also requires that persons who benefit from the race-based promotional relief must be Board-certified as eligible for promotion. Further, the City decree does not prevent non-black firefighters from being promoted to fire lieutenant, calling instead for alternating promotions between blacks and non-blacks. In *Howard*, however, the burden of the promotion plan on non-black employees was more diffused than the burden on non-black firefighters in this case. There were numerous promotion opportunities in *Howard* for which black and non-black employees might compete, irrespective of race, beyond the 38 positions targeted by the decree. By comparison, in this case the only promotional position for which a firefighter might reasonably compete is fire lieutenant. A firefighter would be unlikely to compete for promotions outside the career path of the BFRS. Therefore, although the City decree does not prevent

promotions of non-black employees, it places a greater burden on a smaller number of non-black firefighters than the *Howard* decree placed on larger numbers of non-black Air Force Base employees.

There is absolutely no similarity, however, between the decree approved in *Howard* and the City decree in the overall objective and operation of the two decrees. The *Howard* decree was intended to provide specific relief to victims of past discrimination. It did not attempt to ensure a racially balanced workforce through "blind hiring by the numbers . . . amount[ing] to a rigid and impermissible quota system." *Id.* The overall objective of the City decree, on the other hand, is for the City to employ blacks in each job classification in each of its departments in percentages which approximate the percentage of blacks in the civilian labor force of the surrounding county. Decree ¶ 5.

To achieve that objective among fire lieutenants, the City decree sets a 50% annual quota for promotions of blacks. As we explained earlier, in order to meet both its overall objective and its annual quota, the City classifies firefighters by race and makes promotion decisions based solely upon the race of the candidate. For every two promotions to fire lieutenant, one is made from the list of eligible black firefighters and one is made from the list of eligible non-black firefighters. Such use of race by the City is not narrowly tailored to provide a proper remedy for past discrimination. Rather, it is designed to achieve the unconstitutional objective of outright racial balancing.

The Supreme Court has determined that it is " 'completelyunrealistic' [sic] [to assume] that minorities will

choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, 109 S. Ct. at 729; *see also Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3059 (1986) (O'Connor, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination."). This determination comes despite the Court's acknowledgment that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Bhd. of Teamsters v. United States*, 97 S. Ct. 1843, 1856 n.20 (1977). There is, however, a considerable difference between expecting to find a balanced work force, absent discrimination, and a governmentally imposed plan using race to ensure a racially balanced work force. *See id.* at 1856 & n.20 (noting that, while statistics showing racial imbalance are a probative evidentiary tool often demonstrating telltale signs of racial discrimination, they cannot support "an erroneous theory that Title VII requires an employer's work force to be racially balanced").

The City's use of the 50% annual quota to establish a work force of fire lieutenants reflecting black employment in lockstep proportion to the proportion of blacks in the local labor force cannot withstand strict scrutiny. *See Croson*, 109 S. Ct. at 729 (finding that a city's 30% contract set-aside for minority businesses "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing"); *Cone Corp.*, 908 F.2d at 914 (defining

narrow tailoring in the context of a minority business enterprise plan to "mean[] that the plan must be designed to further some goal other than outright racial balancing"); *Mann v. City of Albany*, 883 F.2d 999, 1005 (11th Cir. 1989) (noting that a majority of the Supreme Court has "expressed clear hostility toward government affirmative-action programs that distribute opportunities woodenly and inflexibly on the basis of an applicant's race"). The City decree institutionalizes race as the sole criteria by which the City selects certified candidates for promotion to fire lieutenant.

The City's rigid approach, while administratively convenient, is not a narrowly tailored means to remedy prior discrimination. It is instead an approach designed to achieve government-mandated racial balancing – the perpetuation of discrimination by government. We can imagine nothing less conducive to eliminating the vestiges of past discrimination than a government separating its employees into two categories, black and non-black, and allocating a rigid, inflexible number of promotions to each group, year in and year out. We conclude that the City's use of race in its affirmative action plan is not narrowly tailored to achieve a compelling government interest. Instead, it provides for "blind hiring by the numbers . . . amount[ing] to a rigid and impermissible quota system." *Howard*, 871 F.2d at 1009.

3. Relationship of Numerical Goals to the Relevant Labor Market. We explained above that fire lieutenants are promoted from the ranks of firefighters, making firefighters the relevant comparison group to which the numerical goals of the decree must be related. *See supra*, part III.A. We have also determined that there is no

relationship between the numerical goal for fire lieutenant promotions and the representation of blacks among firefighters. As such, the City's affirmative action plan does not use race in a narrowly tailored manner.

4. Impact of the Relief on Appellants. The relief provided by the decree in *Howard* had a limited impact on non-black employees. Certain promotions of non-black employees were delayed while the victims of past discrimination were afforded relief. This impact was limited to the length of time it took to achieve the legitimate objective of providing promotional relief to discrimination victims and the decree evaporated after the 240 promotions were made. *Howard*, 871 F.2d at 1009-10. In addition, non-black employees remained eligible for and experienced no delay in pursuing promotions to any of the multitude of jobs outside the 38 targeted by the decree. In fact, in the twenty-month period during which the decree operated, promotions made pursuant to the decree amounted only to slightly more than 4% of all promotions made. *Id.* at 1010. Under those circumstances, we determined that the burden of the race-based promotion decisions imposed on non-black employees did not "fall upon a narrow segment of the work force" and was "relatively diffuse." *Id.* at 1009-10.

The impact of the City decree on the non-black Appellants in this case is much more focused than that of the *Howard* decree. First, the alternating promotion aspect of the *Howard* decree delayed some promotions only until the legitimate objective of providing relief to identified discrimination victims was met. The provisions of the City decree, on the other hand, continue in place until the

City achieves its unconstitutional racial balancing objective or until the district court terminates the decree. Second, while the non-black intervenors in *Howard* had open to them many other promotion opportunities beyond those affected by the decree, in this case non-black firefighters with more than two years' experience could only reasonably expect to compete for promotions in the BFRS to fire lieutenant. When the City decree was implemented, those among the 42 black firefighters who had two years' experience found half of all promotions to lieutenant immediately reserved for competition between them and only them, as a result of their race. Those among the 411 non-black firefighters with two years' experience were consigned by their races to competing for the other half of promotions to lieutenant. Thus, the impact of the decree on non-black firefighters in this case was not "relatively diffuse," but was instead quite pointed.

In *Howard* we found that race was used by the government to provide affirmative remedies for prior discrimination in as narrow a manner as possible under the circumstances. In this case, however, as we concluded above, the City did not use race as a narrowly tailored remedy for prior discrimination. "Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant*, 106 S. Ct. at 1850. The use of race by government in its decisionmaking is "simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove v. Klutznick*, 100 S. Ct. 2758, 2805 (1980) (Stevens, J., dissenting). The City decree uses race as an overbroad remedy,

categorizing BFRS employees by race and promoting them woodenly and reflexively in rigid adherence to a quota system. This broad brush approach, designed to achieve outright racial balancing through an inflexible but administratively convenient quota system, and implemented without consideration of feasible, race-neutral alternatives designed to remedy prior discrimination, is unconstitutional. The decree violates the Appellants' rights under the Equal Protection Clause of the Fourteenth Amendment.

V. Conclusion

We hold that the fire lieutenant promotion provisions of the affirmative action plan embodied in the 1981 City decree violate both Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. We affirm the district court's holding that the Civil Rights Act of 1991 does not bar Appellants' claims. On remand, the district court should provide appropriate relief consistent with this opinion. Accordingly, the judgment of the district court is

AFFIRMED in part, REVERSED in part, and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6778

(Filed Nov 25, 1994)
D.C. Docket Nos. CV84-P-00903-S, CV-82-P-00850-S,
CV82-P-01852-S, CV83-P-02116-S

IN RE:

BIRMINGHAM REVERSE DISCRIMINATION
EMPLOYMENT LITIGATION

JAMES A. BENNETT,

Plaintiff,

FLOYD E. CLICK; JAMES D. MORGAN;
JOEL ALAN DAY; GENE E. NORTHINGTON;
VINCENT JOSEPH VELLA; AND LANE L. DENARD,

Plaintiffs-Appellants,
Cross Appellees,

versus

RICHARD ARRINGTON, JR., as Mayor of
the City of Birmingham; CITY OF BIRMINGHAM;
JAMES B. JOHNSON; HENRY P. JOHNSTON;
and HIRAM Y. McKINNEY, as Members of the
Jefferson County Personnel Board; JOSEPH W.
CURTIN, as Director of the Jefferson
County Personnel Board; and JEFFERSON COUNTY
PERSONNEL BOARD,

Defendants-Appellees,

JOHN W. MARTIN, MAJOR FLORENCE,
IDA McGRUDER, SAM COAR, EUGENE THOMAS,
CHARLES HOWARD,

Defendants-Intervenors-
Appellees-Cross Appellants,

UNITED STATES OF AMERICA,

Defendant-Intervenor-Appellee.

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES,
an unincorporated labor association,
and KENNETH O. WARE,

Plaintiffs-Appellants,
Cross-Appellees,

GERALD L. JOHNSON; PHILLIP H. WHITLEY;
DAVID H. WOODALL; DANNY R. LAUGHLIN;
MARSHALL G. WHITSON; DUDLEY L. GREENWAY,

Plaintiffs,

versus

RICHARD ARRINGTON, JR., as Mayor of the
City of Birmingham; CITY OF BIRMINGHAM;
JAMES B. JOHNSON; HENRY P. JOHNSTON;
and HIRAM Y. McKINNEY, as Members of the
Jefferson County Personnel Board;
JOSEPH W. CURTIN, as Director of the
Jefferson County Personnel Board;
JEFFERSON COUNTY PERSONNEL BOARD; and
THE UNITED STATES OF AMERICA,

Defendants-Appellees,

JOHN W. MARTIN, MAJOR FLORENCE,
IDA McGRUDER, SAM COAR, WANDA THOMAS,
EUGENE THOMAS and CHARLES HOWARD,

Defendants-Intervenors-Appellees-
Cross Appellants.

ROBERT K. WILKS; CARLICE E. PAYNE;
RONNIE J. CHAMBERS; JOHN E. GARVICH, JR.,
JAMES W. HENSON; ROBERT BRUCE MILLSAP,

Plaintiffs-Appellants,
Cross Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

HOWARD E. POPE, CHARLES E. CARLIN,

Plainitffs [sic]-Intervenors-Appellants,

versus

HENRY P. JOHNSTON,

Defendant,

JOHN W. MARTIN, MAJOR FLORENCE,
IDA McGRUDER, SAM COAR, EUGENE THOMAS
and CHARLES HOWARD,

Defendants-Intervenors-
Appellees-Cross Appellants,

WANDA THOMAS,

Defendant-Intervenor.

Appeals from the United States District Court
for the Northern District of Alabama

ON PETITIONS FOR REHEARING

Before EDMONDSON and BLACK, Circuit Judges and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The petitions for rehearing filed by appellees are DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6778

D.C. Docket Nos. CV84-P-00903-S, CV-82-P-00850-S
CV82-P-01852-S, CV83-P-02116-S

IN RE:

BIRMINGHAM REVERSE DISCRIMINATION
EMPLOYMENT LITIGATION

JAMES A. BENNETT,

Plaintiff,

FLOYD E. CLICK; JAMES D. MORGAN;
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VINCENT JOSEPH VELLA; AND LANE L. DENARD,

Plaintiffs-Appellants,
Cross Appellees,

versus

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the City of Birmingham; CITY OF BIRMINGHAM;
JAMES B. JOHNSON; HENRY P. JOHNSTON;
and HIRAM Y. McKINNEY, as Members of the
Jefferson County Personnel Board; JOSEPH W.
CURTIN, as Director of the Jefferson
County Personnel Board; and JEFFERSON COUNTY
PERSONNEL BOARD,

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IDA McGRUDER, SAM COAR, EUGENE THOMAS,
CHARLES HOWARD,

Defendants-Intervenors-
Appellees-Cross Appellants,

UNITED STATES OF AMERICA,

Defendant-Intervenor-Appellee.

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES,
an unincorporated labor association,
and KENNETH O. WARE,

Plaintiffs-Appellants,
Cross-Appellees,

GERALD L. JOHNSON; PHILLIP H. WHITLEY;
DAVID H. WOODALL; DANNY R. LAUGHLIN;
MARSHALL G. WHITSON; DUDLEY L. GREENWAY,

Plaintiffs,

versus

RICHARD ARRINGTON, JR., as Mayor of the
City of Birmingham; CITY OF BIRMINGHAM;
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and HIRAM Y. McKINNEY, as Members of the
Jefferson County Personnel Board;
JOSEPH W. CURTIN, as Director of the
Jefferson County Personnel Board;
JEFFERSON COUNTY PERSONNEL BOARD; and
THE UNITED STATES OF AMERICA,

Defendants-Appellees,

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IDA McGRUDER, SAM COAR, WANDA THOMAS
EUGENE THOMAS and CHARLES HOWARD,

Defendants-Intervenors-Appellees.
Cross Appellants.

ROBERT K. WILKS; CARLICE E. PAYNE;
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JAMES W. HENSON; ROBERT BRUCE MILLSAP,

Plaintiffs-Appellants,
Cross Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

HOWARD E. POPE, CHARLES E. CARLIN,

Plainitffs [sic]-Intervenors-Appellants,

versus

HENRY P. JOHNSTON,

Defendant,

JOHN W. MARTIN, MAJOR FLORENCE,
IDA McGRUDER, SAM COAR, EUGENE THOMAS
and CHARLES HOWARD,

Defendants-Intervenors-
Appellees-Cross Appellants,

WANDA THOMAS,

Defendant-Intervenor.

Appeals from the United States District Court
for the Northern District of Alabama

(December 14, 1994)

SUGGESTIONS OF REHEARING EN BANC

(Opinion May 4, 1994, 11th Cir., 20 F.3d 1525).

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

HATCHETT, Circuit Judge, dissenting:

I respectfully dissent from the court's failure to grant *en banc* rehearing for this case. This case raises important issues meriting *en banc* review. The *en banc*-worthy issues that the court has declined to rehear include:

(1) What factual changes must occur before a district court is justified in modifying a consent decree involving racial discrimination, where the discrimination results from the effects of past discrimination?

(2) Should consent decrees ending litigation be treated the same as voluntary, race-conscious, local government affirmative action programs?

(3) What weight must a district court give to statistical disparities between the proportion of minorities a public employer hires and the proportion of minorities willing and able to do the work?

(4) To what extent are long term goals allowable in consent decrees between public bodies and minority citizens?

(5) Who are "innocents" in terms of a consent decree that provides a remedy for past and present racial discrimination?

(6) Do "innocents" have standing to attack the provisions of a consent decree involving remedies for public body racial discrimination?

(7) May a consent decree in a public body lawsuit set an annual affirmative action goal greater than the proportion of minorities in the qualified labor pool?

(8) May intervenors require the plaintiffs to show, five or ten years after a consent decree has been entered, that the plaintiff class still suffers the effects of racial discrimination?

(9) May intervenors challenge a consent decree ordering affirmative action for minorities, five to ten years later, based upon current law?

To fully resolve these issues I believe *en banc* review is necessary. In addition, I believe the court erred in the following respects:

1. **The record evidence contradicts the panel's characterization of the fifty percent annual goals as a rigid, inflexible quota.**

The panel ignored both the flexibility built into the consent decree and the City's actual promotional practices under the decree. First, the decree does not require

that any positions be set aside for black or white employees. Instead, for the position of fire lieutenant, the decree provides that subject to the availability of qualified black applicants, the City shall establish and attempt to achieve an annual goal of making promotional appointments to vacancies in permanent full-time positions in the classified service of black applicants at the rate of fifty percent. That goal was eliminated once the long-term goal of the decree was met: that is, once twenty-eight percent of the fire lieutenants were black. While the goal was in place, the decree provided that it did not require the City to hire unnecessary personnel or to hire, transfer, or promote a person who was not qualified. The long-term goal has been met. The panel should not have considered the long-term goal.

Second, the implementation of the decree did not rigidly result in alternative promotions. Perhaps the clearest indication of operation of the interim goal is that during the operation of the consent decrees, approximately sixty percent of the fire lieutenant promotions were awarded to white employees while forty percent were awarded to black employees. This fact confirms that the goals were not inflexible and rigid quotas.

2. In concluding that the city's consent decree unnecessary [sic] trammels the rights of white firefighters in violation of Title VII, the panel erroneously assumed that white firefighters are entitled to promotions based upon current unlawful selection procedures.

The panel held "that the city's affirmative action plan violates Title VII because it unnecessarily trammels the rights of non-black firefighters by establishing a rigid, arbitrarily selected quota of fifty percent annual black promotions to fire lieutenant." The panel opinion does not suggest that evidence in the record indicates the white intervenors would have been promoted if the City had used lawful selection procedures. Indeed, the district court found the intervening white firefighters had not demonstrated that any of them were, at the time of the promotions, demonstrably better qualified than any of the blacks certified from the same eligible register based on the result of a valid job-related selection procedure. *In re. Birmingham Reverse Discrimination Employment Litigation*, 39 Fair Empl. Prac. Cas. (BNA) 1431, 1444 ¶ 97 (N.D. Ala. 1985), *rev'd on other grounds*, 833 F.2d 1492 (11th Cir. 1987), *affirmed sub nom. Martin v. Wilks*, 490 U.S. 755 (1989). The panel's holding that the impact of this affirmative action system on the white intervenors constituted unnecessary trammeling on their rights overlooks the fact, which the district court recognized, that the white firefighters have no entitlement to the way things would have been absent the consent decrees because the selection procedures the board and City used discriminated unlawfully against black firefighters.

Moreover, the consent decree did not prevent the promotion of white firefighters, but at worst only delayed the promotions – promotions to which they had no true entitlement. The average delay in the promotion of white firefighters approximated seven and one-half months. Nevertheless, the panel reversed the district court's findings and held that the delay unnecessarily trammeled the rights of white firefighters. The precedent of this circuit and of the Supreme Court does not condone such a view of the import of promotional delays. *See United States v. Paradise*, 480 U.S. 149, 183 (1987) (plurality opinion) ("promotional goal only postpones the promotion of qualified whites. . . . Denial of a future employment opportunity is not as intrusive as loss of an existing job and plainly postponement imposes a lesser burden still."); *Howard v. McLucas*, 871 F.2d 1000, 1009 (11th Cir. 1989) ("the [promotional] relief does not prevent white employees from being promoted. . . . White employees are at most delayed in receiving a promotion to a limited number of specified positions").

The panel also improperly speculated as to the possible harm the white firefighters would experience. For instance, the panel conjectured that the "promotion figure no doubt impacted the earnings of appellants who are likely heavily dependent on wages for their day-to-day living. . . . The failure to be promoted or even the delay in receiving a promotion also likely impacts earnings long into the future under whatever retirement program the city provides for BRFS employees." The panel substituted conjecture for the findings of the district court.

3. The panel's holding that accelerated race conscious relief is unconstitutional unless tied to minority representation in the labor pool clashes with Supreme Court precedent.

The panel held that the "arbitrarily selected fifty percent figure for annual black promotions to fire lieutenant unnecessarily trammels the rights of non-black firefighters" because it is unrelated to the percentage of black people in the relevant labor pool. The Supreme Court, however, has encouraged accelerated promotional remedies unrelated to the percentage of minorities in the underlying labor pools in order to counter the effects of egregious past discrimination. *See Paradise*, 480 U.S. at 179-82 (plurality opinion); *United Steelworkers of America v. Weber*, 443 U.S. 193, 208-09 (1979). The panel's assertion that this "is not a case like *Paradise* where the district court ordered a remedy to combat an egregious refusal to . . . end discriminatory practices" is a distinction without a substantive difference. Attaining a racial balance through accelerated hiring is not unconstitutional; the law only prohibits maintaining such a balance. *Weber*, 443 U.S. at 209 (approving an affirmative action plan that "is not intended to maintain racial balance; but simply to eliminate a manifest racial imbalance"); *Johnson*, 480 U.S. at 639 (upholding plan intended to "attain a balanced work force, not to maintain one").

4. An affirmative action plan need not be the least intrusive means to remedy prior discrimination.

An affirmative action plan need not be the absolute minimum, as the panel implies, *In re Birmingham Reverse Discrimination*, 20 F.3d at 1549 ("the impact of the decree on non-black firefighters in this case was not relatively diffuse, but was instead quite pointed"), to make a difference in redressing past discrimination. *Paradise*, 480 U.S. at 184 (plurality opinion) (remedial plans not limited to least intrusive means of implementation); *see also Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) ("this Court has not required remedial plans to be limited to least restrictive means of implementation"). Innocents may properly bear some of the burden of redressing past discrimination. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 280-81 (1986).

CONCLUSION

Based on the significance of these issues, the full court should have granted *en banc* consideration.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

JAMES A. BENNETT, et al., Plaintiffs, -vs- RICHARD ARRINGTON, et al., Defendants.	)	Case No. CV 82-P-0850-S
B'HAM ASS'N OF CITY EMPLOYEES, et al., Plaintiffs, -vs- RICHARD ARRINGTON, et al., Defendants.	)	Case No. CV 82-P-1852-S
ROBERT L. WILKS, et al., Plaintiffs, -vs- RICHARD ARRINGTON, et al., Defendants.	)	Case No. CV 83-P-2116-S
In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION.	)	Case No. CV 84-P-0903-S

ORDER AND FINAL JUDGMENT

In accordance with the accompanying Opinion, it is ORDERED and ADJUDGED as follows:

1. All claims, counterclaims, and crossclaims in CV 82-P-850-S are DISMISSED with prejudice, and each party shall bear its own costs.

2. All claims, counterclaims, and crossclaims in CV 82-P-1852-S are DISMISSED with prejudice, and each party shall bear its own costs.

3. All claims, counterclaims, and crossclaims in CV 83-P-2116-S are DISMISSED with prejudice, and each party shall bear its own costs.

4. All claims for attorneys fees in CV 82-P-850-S, CV 82-P-1852-S, and CV 83-P-2116-S under 42 U.S.C. § 1988, Title VII of the Civil Rights Act of 1964 and 28 U.S.C. § 2412(d) are DENIED.

Pursuant to Fed. R. Civ. P. 54(b), the Court determines that there is no just reason for delay, and expressly directs that judgment in CV 84-P-903-S be entered to the extent the claims, counterclaims, and crossclaims described in paragraphs 1-4 of this order have otherwise been incorporated as part of CV 84-P-903-S.

This the 14th day of August, 1992.

/s/ Sam C. Pointer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

JAMES A. BENNETT, et al., Plaintiffs, -vs- RICHARD ARRINGTON, et al., Defendants.	)	Case No. CV 82-P-0850-S
B'HAM ASS'N OF CITY EMPLOYEES, et al., Plaintiffs, -vs- RICHARD ARRINGTON, et al., Defendants.	)	Case No. CV 82-P-1852-S
ROBERT L. WILKS, et al., Plaintiffs, -vs- RICHARD ARRINGTON, et al., Defendants.	)	Case No. CV 83-P-2116-S
In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION.	)	Case No. CV 84-P-0903-S

OPINION

The City of Birmingham ("the City") and the Jefferson County Personnel Board ("the Board"), after prolonged litigation in the 1970s over discriminatory hiring and promotion of blacks and females, entered into settlement negotiations with a class of black plaintiffs ("the Martin Intervenors") and the United States. The negotiations resulted in separate proposed consent decrees with the City and the Board. A fairness hearing was held in August 1981 to consider objections from all interested parties. The Birmingham Firefighters Association ("BFA"), as amicus curiae, presented arguments opposing the consent decrees. Their opposition focused on the proposed affirmative action goals, which would impact adversely on white males in the Fire Department.

The court approved the consent decrees on August 18, 1981. The following day the BFA and two white firefighters moved to intervene in the suit. Their motion was denied as untimely, a ruling that was later upheld by the Eleventh Circuit in *United States v. Jefferson County*, 720 F.2d 1511, 1520 (11th Cir. 1983). A separate suit (CA 82-P-850-S) was then filed by seven white firefighters against the City and the Board, claiming "reverse discrimination" would result from enforcement of the consent decrees. An application for a preliminary injunction was denied, and the Eleventh Circuit affirmed, ruling that the white firefighters were unable to show irreparable harm if the decrees were enforced. *United States v. Jefferson County*, 720 F.2d at 1520, 1519-20 n.21. Similar cases were later filed by other white employees of the City.

These cases were consolidated as the "Birmingham Reverse Discrimination Employment Litigation." Once the Martin Intervenors intervened as party defendants to defend the decrees, a motion for partial summary judgment was brought by the City and the intervening parties. The motion for partial summary judgment was denied, and a trial was held in December 1985 on the merits of three test cases.[1] Following the trial, the court denied the plaintiffs' claims.[2] An appeal followed, and the Eleventh Circuit held that the white plaintiffs were not bound by the consent decrees since they were not a party to them. *In re: Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987). The Supreme Court agreed with the Court of Appeals. *Martin v. Wilks*, 490 U.S. 755 (1989). The case was remanded to

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[1] The three test cases were CV 83-P-2116-S, involving the claims of plaintiffs Robert K. Wilks, Ronnie J. Chambers, Carlice E. Payne, John E. Garvich, Jr., Robert Bruce Millsap, James W. Henson, Howard E. Pope, and Charles E. Carlin; CV 82-P-850-S, involving the claims of plaintiffs Floyd E. Click, James D. Morgan, Joel Alan Day, Gene E. Northington, Vincent Joseph Vella and Lane L. Denard; and CV 82-P-1852-S, involving the claims of plaintiffs Kenneth O. Ware and the Birmingham Association of City Employees. The plaintiffs in the first two cases listed here were employees of the Birmingham Fire Department; Kenneth O. Ware, an individual plaintiff in the third listed case, was a City Civil Engineer. There have been other members of the fire and engineering departments allowed to intervene in CV 84-P-0903-S.

[2] Numerous findings of fact were made by the district court. See 39 F.E.P.C. 1431-46 (BNA) (N.D. Ala. 1985). There is no need to repeat these findings, which were not set aside on the appeal and under the law of the case remain as determinations for purposes of this decision.

the district court for a further trial on the merits of the plaintiffs' reverse discrimination claims. Following additional discovery, the trial was held October 21, 1991, and post-trial briefs and reply briefs were submitted by the parties. Upon consideration of the evidence before the court, the court concludes that plaintiffs' claims must be denied.

STANDARD OF REVIEW

Since this case is founded on race-based employment decisions by a public employer, although pursuant to a court-approved remedial action plan, the court must apply a strict standard of review, or strict scrutiny, to the city's decision-making process. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., separate opinion).

CIVIL RIGHTS ACT OF 1991

An initial matter to be addressed is the applicability of section 108 of the Civil Rights Act of 1991. Section 108 amends 42 U.S.C. § 2000e-2 to provide that employment decisions made pursuant to a valid consent decree which is entered under claims of public employment discrimination may not be challenged on a constitutional basis (i) by a person who, prior to the entry of decree, had actual notice of the decree sufficient to advise him that it could adversely affect him and that he could challenge it, and an opportunity to object, or (ii) "by a person whose interests were adequately represented by another person who had previously challenged the [decree] on the same legal grounds and with a similar factual situation, unless

there has been an intervening change in law or fact." It is unnecessary to step into the mire of possible retroactive application of this section, since neither of the conditions was satisfied. The court's decision therefore is grounded in the constitutional analysis developed in recent Supreme Court rulings.

ANALYSIS

The central issue is whether the constitutional rights of the white firefighters were violated by the promotional decisions made by the City pursuant to the consent decree entered into by the City, the United States, and the Martin Intervenors.[3] The Eleventh Circuit directed this court to evaluate whether the consent decree, while not binding on the white firefighters, nevertheless provided the basis for a defense by the City to charges of discrimination when making promotional decisions pursuant to this decree. This directive involves basic consideration of a two-pronged inquiry under *Johnson v. Transportation Agency*, 480 U.S. 616, 631, 637-38 (1987). The first inquiry is whether the adoption of a race-based promotional plan "was justified by the existence of a 'manifest imbalance' that reflected underrepresentation of [blacks] in 'traditionally segregated job categories'." *Id.* at 631 (quoting *Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)). The second

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[3] The court had decided at the December 1985 trial that these promotional decisions had been made pursuant to the decree. 39 F.E.P.C. 1431 (BNA) (N.D. Ala. 1985). These findings were not disturbed on appeal by the Eleventh Circuit or the Supreme Court.

consideration is whether the plan "unnecessarily trammeled the rights of [white] employees or created an absolute bar for their advancement." *Id.* at 637-38. The court concludes that the first condition is met and that the plan did not unnecessarily trammel the rights of whites, nor did it create an absolute bar to their opportunity for advancement.

Was the City justified in entering the consent decree?

Since the City's promotional decisions were clearly race-conscious in that they were mandated by a race-conscious consent decree, the burden is on the City to show its adherence to the decree provides a valid defense for the plaintiffs' claims. The City has met that burden.

First, the City must show that before entering into the consent decree it had a "strong basis in evidence" for believing that it had discriminated against minorities. It does not have to prove that there was an actual finding, either judicial or otherwise, that it discriminated in order to show that it was justified in entering the consent decree.[4] Although *Croson* did affect the way the court

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[4] The burden on the defendants in this action is not to prove at trial the existence of past discrimination by the City. Instead, the issue is whether at the time it agreed to the consent decree the City had a strong basis in evidence for believing that there had been discrimination against blacks (and women). *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion); *Howard v. McLucas*, 871 F.2d 1000 (11th Cir. 1989). Indeed, actual "findings" of discrimination need not be made by the City at all. *See Wygant*, 476 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment); *Howard v. McLucas*, 871 F.2d at 1006.

evaluates a claim of reverse discrimination, it did not overrule the Supreme Court's earlier holding that statistical evidence can support a finding of discrimination: "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977), *quoted in Peightal v. Metropolitan Dade County*, 940 F.2d 1394, 1401-02 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992). In the 1985 trial of these cases, the court found that there was significant evidence of prior discrimination at the time the City entered into the consent decrees. *See In re: Birmingham Reverse Discrimination Employment Litigation*, 39 F.E.P.C. (BNA) 1431, 1437, ¶¶ 12-13 (N.D. Ala. 1985); *see also United States v. Jefferson County*, 28 F.E.P.C. (BNA) 1834 (N.D. Ala. 1981). The additional evidence presented in the 1991 trial confirms those findings.

It should be emphasized that, prior to the City's entering the consent decrees, there had been a district court decision – affirmed in pertinent parts by the Court of Appeals – holding that the tests used by the Personnel Board to determine persons eligible for entry-level positions in the City's police and fire departments had a severe adverse impact on blacks and were not sufficiently job-related to pass muster under Title VII. *See Ensley Branch of N.A.A.C.P. v. Seibels*, 616 F.2d 812 (5th Cir. 1980). The discriminatory restrictions on these entry-level positions also meant, of course, that blacks had been denied the opportunity to hold higher level positions in these departments. There then had been – again before the

consent decree was entered – a further trial, with voluminous evidence, attacking scores of other tests and selection devices administered by the Personnel Board as having a similar adverse impact and insufficient job-relatedness. It was only when faced with the imminence of a decision by the district court concerning these tests and devices that the consent decrees were entered.

Was the consent decree narrowly tailored?

The closer question seems to be the second prong of this inquiry: Whether the consent decree was sufficiently limited and tailored to the appropriate relief. An initial consideration in determining whether the relevant decrees were narrowly tailored is whether the City pursued other means to increase the representation of minorities in the Department. Other factors utilized by the Supreme Court in *United States v. Paradise*, 480 U.S. 149, 171 (1987) (Brennan, J., plurality opinion) (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 481, 486 (1986)), in evaluating whether race-conscious employment measures by a public employer are narrowly tailored, are "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.* at 171.

These factors, applied to the facts of this litigation, show that the decree is limited and tailored to the relief necessary to overcome the employment effects of past discrimination by the City. The City did attempt to correct its past discrimination in or around 1974, prior to the

entry of the consent decree. City Mayor Richard Arrington testified that an affirmative action ordinance was proposed and submitted to the City Council which would have "establish[ed] some goals for minority hiring" and "would have permitted the City to carry out certain efforts in recruitment to try to increase the pool in which [the City] hired people. . . . It was aimed at trying to increase minority hiring in the City of Birmingham." Trial Trans. at 96.[5] The ordinance was adopted by the City Council, but later vetoed by the then Mayor Seibels. A subsequent ordinance was later passed which placed the responsibility on various City department heads to set and achieve minority employment goals. Trial Trans. at 97-98. These alternative measures were not effective, as evidenced by the hiring of only two blacks in the Fire Department by 1974. Indeed, the employment records offered at trial show that as of July 21, 1981, only 9.3% of the firefighters were black, and none of the fire lieutenants, captains, or battalion chiefs were black.[6]

The City decree also satisfies considerations of flexibility and duration. It does not require the City to promote unqualified blacks in the Fire Department. Instead, it requires that, when both black and white firefighters are certified to the Fire Department as qualified applicants for a promotion, the Department will alternate

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[5] Mayor Arrington, then a member of the City Council, in 1974 supported the City's adoption of the ordinance.

[6] According to the Birmingham Personnel Board's July 21, 1981, affirmative action report, 42 of 453 firefighters in the Birmingham Fire Department were black, 2 of the 10 fire communications operators were black, and zero out of 94 fire lieutenants, 31 fire captains and 15 fire battalion chiefs were black.

between blacks and whites, selecting the white or black applicant who is ranked highest according to the Board's ranking procedure.[7]

The consent decree is also tailored to the relief sought by its limitation in time to achievement of the long term goal of attaining employment representation of blacks and women in the City's work force in approximate relation to their respective percentages in the civilian labor force of Jefferson County as shown in the 1970 federal census. It provided for modification in the long term goal in accordance with any changes in the appropriate work force reflected in the 1980 census. City of Birmingham Consent Decree, para. 5. Annual goals were established to meet that long term goal. Specifically in regard to promotion in the Fire Department, an interim goal was established, subject to the availability of qualified blacks, of

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[7] The Board ranks individuals according to two factors. The first factor is the applicant's score on a job-related test administered by the Board. The second factor is the number of seniority points achieved by the individual. Seniority points are accumulated according to the number of years of service, with a maximum of 20 points available to an individual.

The court made specific findings of fact regarding seniority points in the 1985 trial of these consolidated cases. In short, it found that there was "no evidence demonstrating a relationship between [Department] seniority and job performance as an officer." Since blacks were effectively barred from employment in the Department, as evidenced by the presence of only two black hires before the first discrimination suit in 1974, seniority points were found to have an "obvious adverse impact." Thus, seniority was found not to be a factor that the Fire Department could use in choosing between black and white candidates for promotion. 38 F.E.P.C. (BNA) 1431 (N.D. Ala. 1985) (Findings of Fact Nos. 58-60).

the promotion of one black for the next two captain positions that were vacant. Thereafter, until the long term goal in the Department was met, blacks should be promoted to captain vacancies "at twice the black percentage representation in the job classification from which promotional candidates are traditionally selected for [that] job. *Id.* at para. 8. The decree further provided for direct recruitment of blacks when insufficient numbers of blacks to fill the interim goals were certified to the City by the Board. *Id.* at para. 10b(i). The decree also provided that reduction of the underrepresentation of blacks and females would be pursued through departmental affirmative action plans, *id.* at para. 11; through an affirmative job recruitment program administered through, but not limited to, local high schools, vocational schools, colleges and organizations aimed at obtaining job opportunities for minorities, *id.* at para. 14; through advertising for qualified minorities, *id.*; and through job posting, *id.* at para. 15. In addition, the decree provided that any party could move the court for dissolution of the decree after six years from the date it was entered. *Id.* at para. 55. In fact, upon motion, the decree was modified in May 1991 by this court based on its continuing jurisdiction over the decree.[8]

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[8] The May 1991 modifications were amended by order of the district court dated September 25, 1991, to provide, in relevant part, that the promotional goals set for blacks in paragraph 8 of the decree "shall not apply if all testing and screening procedures utilized by the Personnel Board and by the City with respect to a job classification either have no adverse impact upon such persons or are demonstrated to be valid under applicable law." September 25, 1991, order amending the consent decree with the City of Birmingham. Furthermore, the decree

The decree was also tailored to an appropriate relevant labor market when the City agreed to it. The decree provides for hiring goals for blacks in proportion to their representation in the labor force of Jefferson County.[9] Since the position of firefighter is an unskilled position, this is an appropriate correlation under *Johnson v. Transportation Agency*, 480 U.S. 616, 631-32 (1987). The promotions within the Fire Department to captain and battalion chief were tied to the black representation within that Department, albeit accelerated by the original interim goal to twice the representation of blacks in the Department.

In earlier litigation of this case, the court found that "[s]ince the entry of the Decree, some [whites] have been promoted immediately upon certification, others after only a delay, and those not promoted have had or will have an opportunity to compete as each new exam is given and an eligible register (which is valid for only a year) is created." *See* 39 F.E.P.C. (BNA) 1431 (N.D. Ala.

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modification was amended to provide that the interim goals for promotions in the Fire Department would change to reflect promotions "in approximately the same proportion as the percentage of black applicants for such positions" once the hiring goals for blacks in the Department were met. *Id.*

[9] Expert witness testimony regarding the City's selection of the relevant labor force shows that the City did not select the labor force which would have reflected the highest percentage of blacks. The labor force of the City of Birmingham proper, according to the 1980 federal census, consisted of 49.9% blacks and 50.1% whites, while the labor force of Jefferson County was 28.1% blacks and 71.9% whites. Use of the City's relevant labor force in fashioning the City's goals would have resulted in significantly higher goals for black employment.

1985) (Findings of Fact No. 14). These findings show that the effect on third parties, specifically the white firefighters complaining of racial discrimination in this case, is an acceptable burden. There were no provisions to use layoffs as a means for favoring junior black employees over more senior white employees, nor was there an absolute bar to promotions for white Department members, since half of the promotions would be whites. *See Johnson v. Transportation Agency,* 480 U.S. 616, 631-32 (1987).

CONCLUSION

This court concludes that the City's actions, taken pursuant to the consent decree constituted valid, constitutional decisions. *See, e.g., Stuart v. Roache,* 951 F.2d 446 (1st Cir. 1991), *cert. denied,* 112 S. Ct. 1948 (1992). The various claims, counterclaims, and crossclaims in CV 82-P-850-S, CV 82-P-1852-S, and CV 83-P-2116-S must be denied. In the absence of any just reason for delay, the order accompanying this opinion also directs final judgment in CV 84-P-0903-S pursuant to Fed. R. Civ. Proc. 54(b) to the extent these matters have previously been incorporated as part of that case.

This the 14th day of August, 1992.

/s/ Sam C. Pointer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

UNITED STATES OF AMERICA, Plaintiff; -vs- JEFFERSON COUNTY, et al., Defendants.	Case No. CV 75-P-666-S
JOHN W. MARTIN, et al., Plaintiffs; -vs- CITY OF BIRMINGHAM, et al., Defendants.	Case No. CV 74-Z-17-S
ENSLEY BRANCH, N.A.A.C.P., et al., Plaintiffs; -vs- GEORGE SEIBELS, et al., Defendants.	Case No. CV 74-Z-12-S

OPINION

(Filed May 20, 1991)

Under submission are motions and requests[1] to modify consent decrees involving the City of Birmingham and

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[1] On May 3, 1990, the United States filed its motion to modify both decrees. On May 23, 1990, the Wilks intervenor class filed their motion to modify both decrees, and amended this motion on June 27, 1990, and again on January 29, 1991. Motions for modification were not filed by the Martin plaintiff class, by the City of Birmingham, by the Jefferson County Personnel Board, or by the Bryant intervenor class; however, in

the Jefferson County Personnel Board that were entered in 1981. Following several months of discovery, an evidentiary hearing relating to these motions was held on February 27, 1991, and subsequently the parties filed briefs outlining their various positions. The primary focus is upon the City's consent decree. As will be explained, the court concludes that in certain respects modifications should be ordered.

I. Background; General Principles.

These cases were brought as "pattern and practice" actions and class actions, alleging employment discrimination by government bodies in Jefferson County against blacks and females. The consent decrees were entered in 1981 after the cases had been in litigation for over six years and after two trials. For almost ten years the parties have been operating under the terms of the decrees.[2] It can hardly be denied that during this period the decrees have, in conjunction with a city administration whose executive and legislative leaders have reflected the majority-black voting population within the city, served to reduce, if not eliminate, discriminatory employment practices against blacks and females and, indeed, to enhance the opportunities of such persons for

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their briefs all of these parties indicated their support for at least some modifications.

[2] Consent decrees involving various other governmental employers in Jefferson County, have, by their own terms, expired.

employment and promotion.[3] Nor can it be denied that, in so doing, the decrees have impaired some employment or promotional opportunities of whites and males – which has in turn resulted in the filing of new individual and class actions that charge "reverse discrimination." Moreover, even for the primary beneficiaries of the decree, there is a tension between goals established for blacks and those established for females that has led, for example, to claims by white women that black men have been unfairly favored in certain employment decisions.

All parties agree that some modifications have become appropriate. This is hardly surprising given the details of the decrees, which, disregarding appendices, resulted in a 30-page decree with respect to the city and a 28-page decree with respect to the Personnel Board. They disagree as to the nature and scope of the modifications to be made, and as to the standards that govern the court in its consideration of these changes. In *Hodge v. Dept. of H.U.D.*, 862 F.2d 859 (11th Cir. 1989), the Eleventh Circuit attempted to harmonize *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), with *United States v. Swift & Co.*, 286 U.S. 106 (1932), and provided additional guidance to district courts when confronted with a

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[3] As of September 7, 1990, blacks constituted over 45% of Birmingham's 3,750 permanent full-time employees, and females over 25% of these employees. In the two departments that were at the core of the litigation, the percentage of black employees rose during the past 8 years from 20% to 41% in Police Department and from 10% to 26% in the Fire and Rescue Service Department. The percentage of blacks and females in jobs above entry-level positions has also increased significantly in many departments.

request for modification of an injunction. In essence, the court held that, when an injunctive decree involves the supervision of changing conduct or conditions and is therefore provisional and tentative, typically where the matters addressed involve "institutional" reform, modification may be granted more freely than when the decree was intended to protect rights fully accrued and substantially impervious to change. *Hodge*, 862 F.2d at 862-864, citing *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984), and *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (*en banc*).

The consent decrees at issue here clearly are of the sort described in *Hodge* as subject to the more flexible standard for modification, under which this court is directed to consider whether particular modifications would, under the particular facts and circumstances, further the underlying purpose of the decrees. The decrees attempted to provide not only a remedy for those plaintiffs and class members who had been adversely affected by arguably discriminatory employment decisions – those with "accrued rights" – but also protection against future discrimination against blacks and females – those without any "accrued rights." While special provisions relating to enhanced opportunities for blacks and females were included in view of their "under-representation" in the work force, the decrees stated a broader and more fundamental objective: *e.g.*, paragraph 1 of the Birmingham consent decree stated that the City was

> permanently enjoined and restrained from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or

> prospective applicant with, the City of Birmingham because of such individual's race, color, or sex. Specifically, the City shall not discriminate on the basis of race, color or sex in recruiting, hiring, promotion, upgrading, training, job assignments, discharge or other disciplinary measures, compensation, or other terms and conditions of employment.

Seeking to strike an appropriate balance between the relief appropriate for those with arguably accrued rights and the more general proscription quoted above, the City decree established, *inter alia*, certain long-term goals and certain annual interim goals relating to the employment of minorities in various departments and jobs. The long-term goals were made expressly subject to the availability of qualified minority applicants. The annual goals were not only subject to the availability of qualified minority applicants, but also dependent upon the percentages of minority candidates in the work force and in the applicant pools. The long term and annual goals were subject to modification based on disparities in the percentages of persons possessing degrees, licenses, or certificates required for particular jobs. Both types of goals were, therefore, necessarily dependent upon future conditions.

The decree required development of affirmative action plans and semi-annual reviews, recognizing that implementation was not a ministerial or mechanical process but would involve consideration of changing conditions. Detailed reports reflecting changes in the work force were required on an annual and semi-annual basis. By paragraph 55 of the Birmingham decree, the court retained jurisdiction "for such further relief or other orders as may be appropriate," and it was provided that

after six years any party could move for dissolution of the decree, with the court to take into account whether the "purposes of this Consent Decree have substantially been achieved." These terms reflect the necessarily provisional nature of the consent decrees, which, though directed towards governmental employment practices, constituted an effort to effect "institutional reform" no less than injunctions affecting the operation of institutions such as prisons.

As noted in *Hodge*, the court's authority to modify the decrees is not unbounded. It is called upon to exercise "judicious discretion." In this process, the court should be guided by the underlying purposes of the decrees, evaluated in the light of current conditions. Changes in the employment practices of the city over the past 10 years, as well as changes in the legal principles governing discrimination claims and difficulties experienced in implementation of the decrees, are of particular significance. In this connection, it is not inappropriate to consider the impact the decrees have had, and may continue to have, upon the interests of persons who were not parties to the consent decrees, who therefore are not "bound" by such decrees, but who may be adversely affected by employment decisions authorized or directed by such decrees.[4] While aware that the Supreme Court

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[4] In taking note of the claims of "reverse discrimination" brought by whites and males, the court is not ruling upon the merits of those claims or upon the merits of the defenses raised by the defendants therein, which in part emphasize their obligations under the consent decrees. Such matters are to be resolved in the consolidated litigation currently pending before the court under the style of "In re Birmingham Reverse Discrimination Litigation."

has recently granted certiorari in two cases that could result in that Court's reassessment of the standards appropriate for modification of injunctions, this court concludes that it should not defer its ruling while those cases are being considered.

II. Goals

Under the decree the City of Birmingham was required to adopt "as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification in each department of the City . . . in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census." These percentages were to be modified to reflect the racial and sexual composition of the civilian labor force as reflected by the 1980 census.[5] Based on census data for the entire county, these long term goals were established as 28% for blacks and 43% for women.

For about 100 of the more than 500 job classifications, the decree set annual interim goals for hiring and promotions as a specific means for reaching these long term goals. The decree directed the city to attempt annually to

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[5] The City, Martin plaintiffs, and Bryant intervenors have requested that the long term goals, at least where not already achieved, should be modified by using 1990 census data, which apparently will reflect that the percentage of blacks in the county's civilian labor force has risen from 28% to 32% Given the dubious validity of this figure as a measure of a discrimination-free work force for the wide range of job classifications, as will be discussed *infra*, the court rejects this request.

fill vacancies in certain jobs with blacks at stated rates ranging from 25% to 50%[6] or, if higher, in proportion to the number of black applicants. The city was directed to attempt annually to fill vacancies in specified jobs with women at stated rates ranging from 15% to 30%[7] or, if higher, in proportion to the number of female applicants. The annual goal for blacks was expressly made "subject to the availability of qualified black candidates," and, by virtue of another part of the decree, the same condition was also made applicable with respect to the annual goal for females.[8]

The parties who contend that the long term goals should be retained argue that, being based on census data for the entire county, the long term goal for blacks – 28% – is conservative, since blacks constituted 50% of the city's civilian labor force according to the 1980 census. However, it was not – and is not – inappropriate to use the county figures as more reflective of the pool of potential applicants for employment or promotion.[9] Those who

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[6] Special provisions were included with respect to promotions of qualified black candidates to the positions of lieutenant and captain in the police department, and captain in the fire department.

[7] The annual goal for females for positions in the police department above the rank of sergeant was twice the proportion of women in the job classifications from which promotional candidates had been traditionally selected.

[8] Paragraph 2 provided that nothing in the decree should be interpreted "as requiring the City . . . to hire, transfer, or promote a person who is not qualified."

[9] Use of the county figures was not inadvertent. Indeed, as a means to accelerate attaining of the long term goals, the decree authorized the city to give a preference to residents of the city.

oppose retention of the long term goals argue – correctly – that the use of a single measure (civilian labor force) does not provide an accurate estimate of the pool of persons potentially qualified for each of the hundreds of different jobs in city service. There can be little doubt that the civilian labor force data would not pass muster under current legal standards as a valid measure of a discrimination-free job force for all city jobs,[10] and only with respect to job classification requiring a professional degree, license, or certificate did the decree expressly authorize use of a measure other than this general labor force figure.

For many jobs, particularly entry-level and near entry-level classifications, the long term goal for blacks has been met; and, to a lesser extent, this goal for women has also been met. The parties are in general agreement that, when this has occurred, the annual goals should no longer be deemed applicable with respect to such position. The decree implicitly calls for elimination of such annual goals once the long term goal has been achieved, and there would be no need for a modification of the decree merely to address this explicitly.

Certain job classifications (*e.g.*, cashier, data entry operator, intermediate clerk, etc.) are common to more than one city department, and only one exam is administered by the Personnel Board for vacancies in the several departments. Frequently only one or two persons may be

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[10] See *Wards Cove Packing Co. Inc. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115, 2121 (1989) ("proper comparison is between the racial composition of [the particular jobs] and the racial composition of the qualified population in the relevant labor market").

employed in such a classification in a particular department. Under the decree, however, the long term and annual goals are applicable to each classification separately within each department. As to these common job classifications, the decree should be modified to provide that employment statistics should be accumulated across departmental lines in determining whether the long term goals have been achieved and, in turn, whether any annual goals should continue in effect.[11] Otherwise the goals may not merely correct "under-representation" of blacks or women, but indeed cause "over-representation." It should be noted that aggregation of data across department lines may cause goals to remain in effect for such a position within a department even after it has achieved the 28% or 43% level for the classification within that department.

Special problems arise in applying these goals – whether "long term" or "annual" – to the top positions in a department or, indeed, to any job classification in a department which is held by only a very few persons. A major difficulty is how to apply such a goal when only one or two persons hold the classification. A less obvious problem arises from the fact that vacancies in such positions may arise only infrequently, and that decades might be required before a black or woman was promoted to each such position. The decree should be modified so

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[11] Of course, the city will still be under an obligation not to discriminate in selecting persons for these positions. Fulfillment of the long term goal simply has the effect of eliminating any preferential treatment that might be accorded on the basis of race, color, or gender through continuation of the annual goals.

that, in measuring attainment of goals, some job classifications – though not subject to a common examination – should be aggregated, either within a department or perhaps across departmental lines. Further, the decree should be modified to call for a judicial reassessment at a specified future date as to whether there then is a need for any goals to remain in effect, without having to wait until such time that the decree should in all respects be dissolved. The latter has particular significance with respect to the prescribed 43% long term goal for women, which is clearly an invalid measure of any "under-representation" of females having an interest in many of the city's jobs.

As previously discussed, the long term goals – 28% for blacks and 43% for women – are inherently suspect to the extent they govern employment decisions with respect to the wide range of job classifications currently in place. With the modifications above described, the adverse consequences arising from use of this potentially inappropriate measure will be partly reduced.

Moreover, these long term goals, in and of themselves, have proved in practice to be largely hortatory. Their primary effect has been to set a [sic] expiration date for the annual goals that have actually affected employment decisions for about 100 job classifications. These annual goals have been the feature of the decree that have most directly enhanced the employment opportunities for blacks and females and, in turn, most directly affected those same opportunities for whites and males.

As previously noted, the annual goals impose upon the city an obligation to attempt to fill 25-50% of the

annual vacancies in these classifications with blacks and 15-30% of the vacancies with females, or, if higher, in proportion to the number of blacks or females within the applicant group. These alternative percentage goals with respect to promotional positions can be justified if, in the positions from which promotions are traditionally made, blacks or women are still "under-represented." Where, however, promotions are made from incumbents in lower-ranked classifications and the long term goals for employment of blacks or women in those classifications have been achieved, the decree should no longer set annual goals at a rate greater than the proportion of minority applicants for the promotion. The decree should be modified to eliminate the percentage goals in such circumstances. If, for example, the 28% long term goal for blacks in Intermediate Clerk positions had been achieved, and there were 4 black [sic] and 8 whites applying for eight vacancies in Senior Clerk positions as to which the long term goal had not been achieved, the city should not be under a duty to appoint all four blacks in order to meet the 50% annual goal now stated in the decree. Appointing three blacks – in proportion to their percentage in the applicant group – should satisfy any goal prescribed in the decree to correct the effects of under-representation possibly caused by prior discrimination.

To summarize, the court concludes that, with respect to the stated goals, the City's decree should be modified to (1) make explicit that, once having satisfied the long term goal with respect to a job, any annual goals no longer are in effect with respect to that job; (2) to provide

that, for "common" job classifications, data for such classifications should be aggregated for purposes of determining when the long term goals have been satisfied and, until such time, of applying annual goals; (3) to direct the parties to study job classifications which are held by few persons to ascertain which should be aggregated, within or across departments, for purposes of determining when the long term goals have been satisfied and, until such time, of applying annual goals; and (4) to provide that the annual percentage goals specified in paragraphs 6, 7, and 9a and in Appendices A and B cease to apply with respect to promotional positions after the long term goals have been satisfied with respect to the job classifications from which such promotions are made.[12] With these changes, and with the modification relating to review of the goals discussed *infra*, the goals may be properly retained in the decree notwithstanding the problems created by use of the civilian labor force figures from the census.

III. Recruitment.

The parties are in general agreement that recruitment efforts by the City and the Board should be strengthened

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[12] Nor should an annual percentage goal apply to a job for which testing or screening procedures developed by the Personnel Board do not have an adverse impact upon blacks or females or are shown to be valid under the standards prescribed in the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed.Reg. 38250 (August 25, 1978). Measurements of adverse impact should be based not simply on a pass-fail basis, but on the provisions for ranking successful applicants under the "Rule of Three" provision that ordinarily governs certification of candidates for vacancies.

in various ways, such as advertising job opportunities in daily newspapers and special-audience media, and providing information about such opportunities to various institutions and organizations having an interest in employment of minorities. They also agree that, to enhance the its [sic] efforts, the city should be notified by the Board of any application periods for city job classifications at least 30 days before the expiration of such periods.

The city and Board have indicated their willingness to undertake such increased recruitment efforts. As such activities are already permitted and indeed encouraged by the decrees, the decrees do not need to be modified to accommodate such efforts.

IV. Duration of Goals.

The City's decree should be modified to provide that in five years the court will consider whether there is a demonstrated need for the retention of any annual goals for job classifications for which the long term goals have not then be [sic] met. Cessation of such goals after fifteen years of implementation may be appropriate even if, considering other aspects of the decree, all purposes of the decree have not been "substantially achieved" and hence the decree should not be totally dissolved.

V. Testing Procedures.

Several of the parties have requested that the court explicitly require the Personnel Board to develop testing and screening procedures that either would not have

adverse impact upon minorities or would meet the validation standards prescribed by law. The court certainly agrees that use of such testing procedures would be desirable, but concludes that specific requirements for development and review, particularly if accompanied by a judicially-imposed timetable, would be unrealistic, unworkable, and unwise. The court declines to order any modification of the Board's decree. It should, however, be noted that the Board has indicated its willingness to give advance notice of planned new test administrations, providing the parties at least 90 days prior to administration dates in which to object or make suggestions for improvement of the procedures proposed.

This the 17th day of May, 1991.

/s/ Sam C. Pointer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

UNITED STATES OF AMERICA, Plaintiff; -vs- JEFFERSON COUNTY, et al., Defendants.	Case No. CV 75-P-666-S
JOHN W. MARTIN, et al., Plaintiffs; -vs- CITY OF BIRMINGHAM, et al., Defendants.	Case No. CV 74-Z-17-S
ENSLEY BRANCH, N.A.A.C.P., et al., Plaintiffs; -vs- GEORGE SEIBELS, et al., Defendants.	Case No. CV 74-Z-12-S

ORDER

(Filed May 20, 1991)

In accordance with the opinion filed herewith, it is hereby ORDERED that the "Consent Decree with the City of Birmingham," entered in 1981, is hereby AMENDED as follows:

1. The goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B shall no longer apply once the goal for such persons set in paragraph 5 has been, or may

hereafter, be achieved with respect to that job classification.

2. The percentage goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B shall no longer apply as to promotional-level positions once the goal for such persons set in paragraph 5 has been, or may hereafter, be achieved with respect to the job classifications from which such promotions are made.

3. The percentage goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B shall not apply if the testing and screen procedures utilized by the Personnel Board with respect to a job classification either have no adverse impact upon such persons or are demonstrated to be valid under applicable law.

4. In determining whether goals set in paragraph 5 have been achieved, and in determining prior to that time how the goals set in paragraphs 6, 7, 9a, and Appendices A and B shall be applied, "common" jobs existing in more than one department that are subject to the same examination or selection procedures by the Personnel Board shall be treated as if a single job in a single department.

5. The parties are directed to confer and in good faith seek to determine which jobs held in a department by few persons should be combined with other jobs in that or other departments for purposes of determining whether goals set in paragraphs 5 have been achieved and in determining prior to that time how the goals set in paragraphs 6, 7, 9a, and Appendices A and B shall be applied.

6. In addition to its retained powers under paragraph 55, the court shall, after this decree has been in effect for fifteen years, determine the extent, if any, that any goals set in paragraphs 6, 7, 9a, and Appendices A and B should thereafter remain in effect with respect to classifications for which the goals set in paragraph 5 have not then been achieved.

The pending motions to modify the Consent Decree with the Personnel Board are DENIED, as are, except to the extent covered in this order, the pending motions to modify the Consent Decree with the City of Birmingham.

This the 17th day of May, 1991.

/s/ Sam C. Pointer, Jr.
United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

UNITED STATES OF AMERICA, Plaintiff; -vs.- JEFFERSON COUNTY, et al., Defendants.	)	Case No. CV 75-P-666-S
JOHN W. MARTIN, et al., Plaintiffs; -vs.- CITY OF BIRMINGHAM, et al., Defendants.	)	Case No. CV 74-Z-17-S
ENSLEY BRANCH, N.A.A.C.P., et al., Plaintiffs; -vs.- GEORGE SEIBELS, et al., Defendants.	)	Case No. CV 74-Z-12-S

ORDER

(Filed Sep. 25, 1991)

In accordance with the opinion filed herewith, it is hereby ORDERED that the Order of May 21, 1991, amending the "Consent Decree with the City of Birmingham" entered in 1981, is itself AMENDED as follows:

A. Paragraph 1 of the Order of May 21, 1991, is amended to read as follows:

> "1. The goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B,

and for blacks in paragraph 8 shall no longer apply once the goal for such persons set in paragraph 5 has been, or may hereafter be, achieved with respect to that job classification."

B. Paragraph 2 of the Order of May 21, 1991, is amended to read as follows:

"2. The percentage goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B shall no longer apply as to promotional-level positions once the goal for such persons set in paragraph 5 has been, or may hereafter be, achieved with respect to the job classifications from which such promotions are made. Once the goals for blacks set in paragraph 5 have been achieved in the job classifications from which promotions are made to the positions of lieutenant and captain in the Police Department and captain and battalion chief in the Fire Department, the interim goals set forth in paragraph 8 shall not apply, and the interim goals shall be to promote, until the goals set in paragraph 5 are achieved, blacks to such positions in approximately the same proportion as the percentage of black applicants for such positions.

C. Paragraph 3 of the Order of May 21, 1991, is amended to read as follows:

"3. The goals set for blacks and women in paragraphs 6, 7, 9a, and Appendices A and B and for blacks in paragraph 8 shall not apply if all testing and screening procedures utilized by the Personnel Board and by the City with respect to a job classification either have no adverse impact upon such persons or are demonstrated to be valid under applicable law."

D. Paragraph 10a of the 1981 "Consent Decree with the City of Birmingham" and Paragraph 23 of the 1981 "Consent Decree with the Jefferson County Personnel Board" are amended by adding to each the following:

> "Until such time that the testing and screening procedures utilized by the Personnel Board in certifying persons to the City of Birmingham with respect to a job classification either have no adverse impact upon black (or female) applicants or are demonstrated to be valid under applicable law, the Personnel Board shall, upon request by the City and subject to the availability of qualified applicants, include in the list of individuals certified to the City for consideration such number of black (or female) applicants as will approximately reflect the percentage of black (or female) applicants for the position."

E. Paragraph 6 of the Order of May 21, 1991, is amended to read as follows:

> "6. In addition to its retained powers under paragraph 55, the court shall, after this decree has been in effect for fifteen years, determine the extent, if any, that any goals set in paragraphs 6, 7, 8, 9a, and Appendices A and B should thereafter remain in effect with respect to classifications for which the goals set in paragraph 5 have not then been achieved and the extent, if any, that any special certifications of blacks or females should remain in effect."

Except as above provided, the pending motions to clarify, modify, amend, or reconsider the Order of May 21, 1991, are denied.

This the 25th day of September, 1991.

/s/ Sam C. Pointer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

UNITED STATES OF AMERICA, Plaintiff; -vs.- JEFFERSON COUNTY, et al., Defendants.	)	Case No. CV 75-P-666-S
JOHN W. MARTIN, et al., Plaintiffs; -vs.- CITY OF BIRMINGHAM, et al., Defendants.	)	Case No. CV 74-Z-17-S
ENSLEY BRANCH, N.A.A.C.P., et al., Plaintiffs; -vs.- GEORGE SEIBELS, et al., Defendants.	)	Case No. CV 74-Z-12-S

OPINION

(Filed Sep. 25, 1991)

Under submission are motions by the parties to clarify, modify, amend, or reconsider the court's order dated

May 21, 1991. Upon considering these motions and the parties' briefs and after carefully scrutinizing the order for other possible problems, the court concludes that in a few respects the May 21st order should be amended.

The May 21st order inadvertently failed to address the interim goals for promotion of blacks to lieutenant and captain in the Police Department and to captain and battalion chief in the Fire Department. These goals, contained in paragraph 8 of the Consent Decree, should be treated like the goals for other positions established by paragraphs 6, 7, 9a, and Appendices A and B. To correct this omission, appropriate modifications are made to paragraphs 1, 2, 3, and 6 of the May 21st order.[1] Paragraph 5 of the May 21st order is not modified because, given the particular focus on these positions in the litigation and in the provisions of the Degree, these positions should not be combined with others in ascertaining when goals have been met.

Paragraph 3 of the May 21st order called for elimination of interim goals for positions at such time that the testing and screening procedures utilized by the Personnel Board for a position either have no adverse impact upon blacks or women or are demonstrated to be valid under applicable law. As stated above, these provisions should affect the goals set in paragraph 8 of the Consent Decree as well as the interim goals set in other portions of

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[1] Since, unlike the goals set for other positions, paragraph 8 of the Consent Decree did not contain an alternative "applicant flow" goal, the modification of paragraph 2 of the May 21st order requires more than merely inserting a cross reference to paragraph 8.

the Consent Decree. The language needs to be further revised to provide that, with respect to those few positions for which the City has imposed additional screening procedures, the interim goals should not be eliminated unless the additional screening procedures likewise either have no adverse impact or are valid under applicable law.

As written, paragraph 3 referred only to elimination of interim "percentage" goals. It would have inadvertently left in place the alternative interim goals of selecting applicants in proportion to "applicant flow" data even though the testing procedures had no adverse impact on blacks or women or were sufficiently job-related as to be valid under applicable law. To correct this error, the word "percentage" is eliminated from paragraph 3, so that both types of interim goals will be eliminated once satisfactory testing and screening procedures are utilized.

The last matter for consideration is one on which the parties are more sharply divided. It involves the question of what should happen after the long-term goals set in the Consent Decree have been met but while the Personnel Board continues to use tests that have adverse impact upon blacks or women but are not shown to be sufficiently job related to be valid under applicable law. The City correctly points out that, in such circumstances, it will be subject to potential liability under Title VII if it can appoint or promote only on the basis of certifications made from such discriminatory testing devices employed by the Personnel Board. *See, e.g., Powers v. Alabama Department of Education,* 854 F.2d 1285 (11th Cir. 1988).

The primary contention of the City of Martin plaintiffs is that the City should continue to have interim goals based on "applicant flow" data until validated or non-discriminatory screening tests are developed by the Personnel Board. The more appropriate solution, however, is that, until such tests are developed, the City should simply be permitted to obtain enhanced certification lists based upon this "applicant flow" data. In making selections from these lists after the long-term goals have been reached, the City will be under no obligation, whether stated as an interim "goal" or otherwise, to give preference to applicants based on their race or sex, and indeed will be subject to the general proscription of the Consent Decree not to discriminate on the basis of such factors. By receiving certification lists that include blacks or women if part of the applicant group, the City will, in essence, be held accountable under Title VII only for its own actions, and not for the consequences of the Board's use of unvalidated discriminatory screening devices.

The May 21st order will, therefore, be modified to add provisions to the Consent Decrees with Birmingham and the Personnel Board enabling the City to obtain enhanced certification lists until the Board's tests either have no adverse impact or are shown to be valid under applicable law.

This the 25th day of September, 1991.

/s/ Sam C. Pointer, Jr.
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JEFFERSON COUNTY, et al., Defendants.	CIVIL ACTION NO. 75-P-0666-S
JOHN W. MARTIN, et al., Plaintiffs, v. CITY OF BIRMINGHAM, et al., Defendants.	CIVIL ACTION NO. 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., et al., Plaintiffs, v. GEORGE SEIBELS, et al., Defendants.	CIVIL ACTION NO. 74-Z-12-S

CONSENT DECREE WITH THE CITY OF BIRMINGHAM

The plaintiffs filed their complaints in these consolidated actions against the City of Birmingham and others to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment

Opportunity Act of 1972, the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. §1221, *et seq.*, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §3766(c)(1), the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981, 42 U.S.C. §1983, and the Fourteenth Amendment to the Constitution of the United States. In their complaints, the plaintiffs alleged that the City of Birmingham and the other named defendants had engaged in a pattern or practice of discrimination based on race and sex with respect to recruitment, hiring, assignment, promotion, discipline, and other terms and conditions of employment. The City of Birmingham has denied the allegations in the plaintiffs' complaints.

The parties to this Consent Decree are the plaintiffs in the consolidated actions captioned above and two of the named defendants in those actions, the City of Birmingham and Richard Arrington, acting in his official capacity as the Mayor of the City of Birmingham. By entering into this Consent Decree the parties express their desire to avoid the burdens and expense of any further litigation in these actions and to insure that any disadvantages to blacks and women that may have resulted from any past discrimination against them are remedied so that equal employment opportunities will be provided to all. The parties waive any findings of fact and conclusions of law on all outstanding issues solely pertaining to the City of Birmingham except for costs and attorneys' fees. The parties will seek to reach agreement on the amount of attorneys' fees and costs for the private plaintiffs in these consolidated actions. If agreement cannot be reached on the amount of such fees and costs, this matter shall be submitted to the Court for determination. The

United States waives any entitlement it may have to recovery of costs. This Decree shall not constitute an adjudication or admission by the City of Birmingham or others signatory to this Decree of any violation of law, executive order or regulations. The parties accept this agreement as final and binding among the parties signatory hereto as to the issues resolved herein.

The plaintiffs recognize the adoption by the City of Birmingham of Sections 2-4-51 through 2-4-56 of the Birmingham City Code ("the fair hiring ordinance"), the annual preparation and implementation by each department of the City of Birmingham of affirmative action plans in accordance with the fair hiring ordinance, and the issuance by the Mayor of the City of Birmingham of Administrative Directive AA-1 and Executive Order 17-77, as evidence of good faith efforts by the City of Birmingham to take meaningful affirmative action to increase minority and female participation throughout the City's work force.

Now therefore, on the basis of the foregoing representations of the plaintiffs, the City of Birmingham and the Mayor of the City of Birmingham, and all trial proceedings and discovery filed herein to date, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. GENERAL PROVISIONS

1. The defendant City of Birmingham, its officials, agents, employees, and all persons in active concert or participation with them in the performance of city functions (herein collectively referred to as the City) are permanently enjoined and restrained form engaging in any

act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or prospective applicant with, the City of Birmingham because of such individual's race, color or sex. Specifically, the City shall not discriminate on the basis of race, color or sex in recruiting, hiring, promotion, upgrading, training, job assignments, discharge or other disciplinary measures, compensation, or other terms and conditions or privileges of employment. Further, the City shall not retaliate against or in any way take action against any person because that person opposes or has opposed alleged discriminatory policies or practices in the City of Birmingham, or because of that person's participation in or cooperation with the investigation and trial of these actions, or in any proceedings therein.

2. Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure. Nothing herein shall prohibit the City form discharging or disciplining employees for just cause in accordance with applicable law, provided however that any such actions are taken and executed in a non-discriminatory manner without regard to race or sex, and are otherwise consistent and in conformity with the City's obligations under this Decree.

3. Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory within the meaning of paragraph 1 above

or the provisions of 42 U.S.C. 2000e-2(h), (j), and the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack. If any collateral lawsuit involving this Consent Decree arises in state court, then the City shall notify counsel for the plaintiffs and remove such action to the United States District Court.

4. In the event plaintiffs seek to enforce any provision of this Decree they shall provide notice of their intentions to:

City Attorney
City of Birmingham
600 City Hall
Birmingham, Alabama 35203

Such notice shall state, with reasonable particularity, the nature of the alleged violation and the relief sought. The parties shall have a period of thirty (30) days within which to resolve the matter informally. If the parties fail to resolve the matter plaintiffs may, upon expiration of the thirty-day period, apply to the Court for an appropriate enforcement order.

II. GOALS

5. In order to correct the effects of any underrepresentation of blacks and women in the City's workforce caused by any alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the

employment of blacks and women in each job classification in each department of the City of Birmingham in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census. As a means of achieving the long term goal established by this Decree the City may prefer residents of the City for appointment. This long terms goal shall be appropriately modified to reflect any changes in the racial and sexual composition of the applicable civilian labor force as reflected by the 1980 Census. The parties also preserve the right to adjust, through agreement and subject to the approval of the Court, any of the goals provided by this Decree where it can be shown that a professional degree, license or certificate is required to perform the duties of any particular job or jobs in the City's workforce and that blacks and/or women hold such degrees, licenses or certificates in percentage terms which are inconsistent with the goals provided.

A. Goals for Blacks

6. In order to achieve the long term goal in the job classifications set forth below, the subject to the availability of qualified black applicants for those jobs, the City shall establish and attempt to achieve an annual goal of making probational appointments to vacancies in permanent, full-time positions in the classified service of black applicants at the rates set forth below or at the rate of black representation among applicants, whichever is higher.

Job Classification	Interim Annual Goal
1. Account Clerk	50%
2. Automotive Mechanic	50%
3. Building Inspector	33%
4. Construction Equipment Operator	50%
5. Firefighter	50%
6. Gardener	50%
7. Heavy Equipment Operator	50%
8. Labor Supervisor	50%
9. Police Officer	50%
10. Police Radio Dispatcher	50%
11. Police Sergeant	50%
12. Fire Lieutenant	50%
13. Public Works Supervisor	50%
14. Construction Supervisor	50%
15. Refuse Truck Diver	50%
16. Revenue Examiner	50%
17. Secretary	50%
18. Senior Clerk	50%
19. Senior Sanitation Inspector	33%
20. Zookeeper	50%

7. In order to achieve the long term goal in the job classifications within the job groups identified below, and subject to the availability of qualified black applicants for the jobs in those job groups, the City shall establish and attempt to achieve an annual goal of making probational appointments to vacancies in permanent, full-time positions in the classified service of black applicants at the rates set forth below or at the rate of black representation among applicants, whichever is higher. Attached as Appendix A to this Consent Decree is a listing of each of the job classifications included within each of the job groups set forth in this paragraph.

Job Group	Interim Annual Goal
Group I – Engineering Department	
1) Professionals	25%
2) Technicians	25%
Group II – Finance Department	
1) Professionals	25%
2) Technicians	
Group III – Inspection Services Department	
1) Professionals (other than Building Inspector)	25%
2) Skilled Craft Workers	25%
Group IV – Traffic Engineering Department	
1) Technicians	25%
Group V – Office of Housing	
1) Professionals	25%

8. In order to correct the effects of any past underrepresentation of blacks in the Police and Fire departments of the City of Birmingham, and to further insure the achievement of the long term goal established by this Decree, the City shall, subject to the availability of qualified black candidates, promote at least two (2) blacks to the next four (4) lieutenant vacancies in the Police Department and shall promote at least one (1) black to the next two (2) captain vacancies in the Police Department. The City shall, subject to the availability of qualified black candidates, promote at least one (1) black to the next two (2) captain vacancies in the Fire department. Thereafter, and until the long term goal of this Decree is met in the Police and Fire departments, the City shall seek to achieve the interim goals of promoting blacks to

vacancies in lieutenant and captain positions in the Police Department and to vacancies in the positions of captain and battalion chief in the Fire Department at twice the black percentage representation in the job classifications from which promotional candidates are traditionally selected for those jobs.

B. Goals For Women

9a. In order to overcome the effects of any prior underrepresentation of women in the job classifications listed below and to correct for the effects of the Personnel Board's prior practice of restricting its job announcements in many of these positions to "males only", the City shall establish and attempt to meet an annual interim goal of making probational appointments of female applicants to vacancies in permanent, full-time positions in the classified service in the job groups listed below at the rates set forth next to each job group or at the rate of female representation among applicants, whichever is higher. Attached as Appendix B to this Consent Decree is a listing of each of the job classifications included within each of the job groups set forth in this paragraph.

Job Group	Interim Annual Goal
Group I – Police Department Protective Services (Police Officer)	25%
Group II – Police Department Protective Services (Police Sergeant)	25%
Group III – Fire Department Protective Services	15%

Group IV – Engineering Department	30%
Professionals Technicians Para-professionals	
Group V – Inspection Services Departments	20%
Professionals Technicians Skilled Craft Workers	
Group VI – Municipal Garage	20%
Skilled Craft Workers Service/Maintenance Workers	
Group VII – Office of Housing	20%
Professionals	
Group VIII – Streets & Sanitation	20%
Technicians Service/Maintenance Workers	
Group IX – Traffic Engineering	30%
Professionals Technicians Skilled Craft Workers Service/Maintenance Workers	
Group X – Parks & Recreation	20%
Skilled Craft Workers Service/Maintenance Workers	
Group XI – Parking Authority	30%
Protective Services	

9b. With respect to promotions to sworn positions in the police department above the rank of sergeant, the City shall, subject to the availability of qualified female

applicants, seek to insure that women are promoted to such positions in percentages which are approximately equivalent to their percentage representation in the job classifications from which promotional candidates are traditionally selected.

C. Implementation of Goals

10a. In order further to insure the possibility of achieving the goals for blacks and women set forth in this Decree, the City shall request the Personnel Board selectively to certify to the City for appointment qualified blacks and females whenever such action is necessary to provide the City with a certification list that contains sufficient number of blacks and females to meet the goals set forth in this Decree. More specifically, in cases where candidates have been found unqualified or unavailable for appointment, the City shall request that the Personnel Board certify sufficient numbers of qualified blacks and women to meet the goals of this Decree. In this regard the City may request that the Personnel Board certify qualified blacks and females who are not incumbent employees of the City of Birmingham. In determining the City's compliance with the goals of this Decree, the appointment of a black female shall count toward both black and female hiring and promotion goals.

10b. In the event the Personnel Board declines, or is unable, to furnish lists containing qualified blacks of females, or in the event the Personnel Board declines to eliminate from its consideration of eligibles non-validated promotional potential ratings, the City, notwithstanding any state or local law, shall take whatever actions are

required to comply with the terms of this Decree. Such actions may include, but are not limited to:

(i) Directly recruiting blacks or females, for the purpose of supplementing any non-conforming list furnished by the Personnel Board.

(ii) Considering existing black and female City employees for promotion, whether or not such candidate was certified by the Personnel Board and supplementing any such non-conforming list furnished by the Personnel Board with such persons as are deemed qualified by the City.

III. AFFIRMATIVE ACTION PLANS

11. On an annual basis for five years after entry of this Decree, each department of the City shall submit to the Office of the Mayor, in writing, an affirmative action plan designed to increase the employment and promotions of blacks and women in the respective department, and to otherwise promote the implementation of this Decree. The plan shall set forth the affirmative steps to be taken to increase the employment and upgrading of blacks and women.

12. A copy of the affirmative action plan for each department, when approved by the Mayor, shall be posted in a conspicuous and prominent place in the main office of each department of the City, and a copy of each plan shall be prominently posted by the Director of Personnel in a public area in City Hall.

13. Each department head shall submit to the Mayor semi-annual evaluation reports of the department's affirmative action plan. The report shall also include a review of the department's progress in achieving the specific goals of this Decree and of the department's affirmative action plan, noting the goals which were achieved in those not yet achieved, the reason for any failure to achieve goals, and the remedial action being taken to overcome any such failure.

IV. RECRUITMENT

14. The City shall continue to develop and reassess its present affirmative recruitment program designed to inform blacks and women of job opportunities with the City for the purpose of securing sufficient qualified applicants to enable the City to meet the hiring goals set forth herein. The recruitment program shall include maintaining contacts with area high schools, technical and vocational schools, colleges, and organizations which have traditionally expressed an interest in providing minority and female applicants or which indicate such interest in the future, and informing them of employment opportunities with the City. In addition, where appropriate, advertising of employment opportunities shall be placed with or in advertising media primarily directed to black and female audiences for the purpose of emphasizing to blacks and women the availability of employment opportunities with the City. As part of its recruitment program the City shall utilize black and female recruiters for the Police and Fire Departments.

V. JOB POSTING

15. The city shall inform its employees of all opportunities for promotion or transfer. The City shall insure that all written announcements received from the Personnel Board for hiring, promotion and training opportunities with the City are made available to all of its employees reasonably in advance of any scheduled examinations or training for such positions. Such announcements shall be posted in conspicuous places so that reasonable notice is given to the City's employees of such employment opportunities.

16. Notices of vacancies within a department in either permanent, part-time or temporary positions shall be posted separately and in conspicuous places from notices of vacancies in other departments. With respect to promotions and/or training opportunities in the Police, Fire, and Streets and Sanitation departments, the City shall insure that written notification of promotion or training opportunities in jobs in those departments are contained on separate bulletin boards and in conspicuous places at each precinct, fire house or division of such departments. The City shall also seek to insure that such announcements remain on the bulletin board for the specified period of time, and that they are not taken down or otherwise tampered with by unauthorized persons.

VI. SEX RESTRICTIONS IN JOB ANNOUNCEMENTS AND CERTIFICATIONS

17. The City shall not request that the Personnel Board restrict any job announcements or certifications on

the basis of sex except where, pursuant to a proper validation study, gender is determined to constitute a bona fide occupational qualification within the meaning of Section 703(e) of Title VII for the job(s) listed in such announcements or certifications, and such determination is approved in writing by the United States. If such approval is not granted, the City reserves the right upon proper motion to petition the Court for approval of the determination.

VII. HEIGHT-WEIGHT REQUIREMENTS

18. The City shall not use or follow any minimum height or weight requirements which have an adverse impact against blacks or women as selection criteria for any classified service position, nor shall it abide by any such requirements if they are instituted and administered by the Personnel Board.

VIII. ELIGIBILITY TO APPLY FOR PROMOTION TO CERTAIN JOBS

19a. The City shall not require police officers to serve more than three years uninterrupted service in rank (or two years uninterrupted service in rank for candidates who have two years of college credits) in order to be eligible to take the promotional examination for police sergeant, nor shall it require police sergeants to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for police lieutenant. Employees who have obtained permanent status as police lieutenant shall not be deemed

ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank.

19b. The City shall not require firefighters to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for the position of fire lieutenant. Employees who have obtained permanent status as fire lieutenant or fire captain shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank.

19c. For purposes of subparagraphs a and b the term "uninterrupted" service shall include any time spent as a probationary employee.

20. In order to be eligible to take the promotional examinations for the positions of public works supervisor or construction supervisor, an employee must have permanent status as a truck driver, refuse truck driver, labor supervisor, heavy equipment operator or construction equipment operator. In order to be eligible to take the promotional examination for the position of sanitation inspector, an employee must have permanent status as a truck driver or semi-skilled laborer.

21. Any employee who had worked full-time in an unclassified laborer position for twelve consecutive months shall be eligible to apply to take the promotional examinations for the following classifications: semi-skilled laborer, truck driver, refuse truck driver, equipment service worker, automotive mechanic helper. As used in this paragraph, the term laborer shall include the classification of building service worker, laborer, and refuse collector.

22. Any employee who has obtained permanent status as a semi-skilled laborer or truck driver shall be eligible to apply to take the promotional examinations for the following classifications: truck driver, refuse truck driver, labor supervisor, heavy equipment operator, equipment service worker, automotive mechanic helper.

23. Any employee who has obtained permanent status as a truck driver, heavy equipment operator, refuse truck driver, or labor supervisor shall be eligible to apply to take the promotional examination for the classification of construction equipment operator.

IX. PROMOTIONAL POTENTIAL RATINGS

24. The City may continue to use the Personnel Board's current promotional potential rating system in departments where it is shown to have no adverse impact. The City shall discontinue the use of the Personnel Board's current promotional potential rating system in the following departments in which departments such ratings have been demonstrated to have had an adverse impact on blacks: Streets and Sanitation, Police, Fire, Parks and Recreation.

25. The City further agrees to discontinue the use of the Personnel Board's current promotional potential rating system to determine eligibility for promotion in any other department where, based upon any two successive rating cycles (one cycle consisting of 6 months), there is evidence of adverse impact against blacks. In determining adverse impact under this subpart the parties agree to rely upon section 4D of the *Uniform Guidelines.*

X. BACKGROUND INVESTIGATIONS

26. Background investigations shall be conducted in such a manner so as not unlawfully to discriminate on the basis of race or sex. Applicants for employment shall not be disqualified automatically on the basis of an arrest or conviction record, a military discharge that is less than honorable, or a poor credit rating. In considering the effect of a criminal conviction upon an applicant's qualifications, the City shall consider at least the following factors: (1) the nature of the position the applicant is seeking; (2) the nature of the crime; (3) the period of time elapsed since the conviction; and (4) the success or failure of rehabilitation efforts.

27. The City shall establish a written policy concerning background investigations within the Police Department within 90 days after this Decree is entered. As part of that policy, the Police Department shall provide applicants who have been rejected on the basis of the background investigation written notice of the specific reason(s) for their rejection. An applicant who has received such notice shall be allowed ten (10) days to respond orally or in writing and to provide relevant information concerning the basis for rejection. The City shall insure that such oral or written response and relevant information is reviewed by an individual(s) who did not participate in the applicant's initial background investigation, and that this review shall occur before the rejection becomes final. The Department's background investigation policy shall be reviewed periodically to insure that it is administered in a non-discriminatory manner, and that any components, aspects or elements of the background investigation process which result in a

disproportionate disqualification of blacks or women are either eliminated or shown to be job related in accordance with the requirements of the *Uniform Guidelines*. The policy shall also provide that any black or female applicant rejected for a job by reason of an adverse background investigation shall be replaced on the next certification list for such job by an applicant of the same race or gender.

XI. SUPERVISORY INSTRUCTION

28. The City shall inform supervisory personnel that the City shall not discriminate against or harass any employee or potential employee on the basis of race or sex. In addition, the City will instruct such personnel about their responsibility in regard to equal employment opportunity and affirmative action. Supervisory personnel will be evaluated, in part, on the basis of their equal employment opportunity and affirmative action efforts and results, as well as their cooperation with the Affirmative Action Officer.

XII. DISMISSALS FROM THE POLICE AND FIRE TRAINING ACADEMIES

29. The City agrees that prior to the dismissal of a black or female from the police or fire training academy, it shall notify any such black or female in writing of the specific reason(s) that person is subject to dismissal from the academy, and he or she shall be given an opportunity to respond orally or in writing within 10 days to responsible training academy officials with respect to any matters which concern their academy performance. Copies of any

correspondence, notes, memoranda or recordings concerning any matters covered by this paragraph shall be retained by the City and shall be available for inspection by attorneys for the plaintiffs upon request.

XIII. FACILITIES

30. The parties recognize that the City has engaged and is continuing to engage in affirmative efforts to eliminate vestiges of racial segregation in employees' facilities. The City hereby agrees to take steps to insure that such facilities will be maintained in a racially integrated fashion in the future.

XIV. AFFIRMATIVE ACTION OFFICER

31. The City shall appoint an Affirmative Action Officer who shall have the following responsibilities:

(a) Advise black and female employees of the terms of this decree;

(b) Post his or her office hours and location and copies of this Decree in conspicuous places within each department or operational unit of the City;

(c) Receive and investigate complaints of race and sex discrimination and conciliate such complaints when appropriate, and notwithstanding any other provisions of law, establish a written procedure which shall govern such complaints;

(d) Maintain a complete record of all actions taken in pursuit of the duties outlined above, including all correspondence directed to

or from the City of Birmingham with respect to any complaints or investigations undertaken pursuant to this Consent Decree and any investigatory files; and

(e) To review, prior to final selection, a department head's written justification for failure to select certified black or female applicants in jobs in which blacks or females are underrepresented. The Affirmative Action Officer shall submit his or her written comments together with the appointing authority's written justification to the Office of the Mayor, prior to final selection.

XV. AFFIRMATIVE ACTION COMMITTEES

32. The City shall appoint separate affirmative action committees for the Police Department, the Fire Department, and the Streets and Sanitation Department. Each committee shall be composed of not less than 3 nor more than 5 members who are City employees, and who may be either incumbents in their respective departments or individuals selected from outside such departments. Such committees shall meet periodically to review the job assignment and disciplinary policies in their respective departments in order to insure that such policies are maintained and administered in a manner that does not unlawfully discriminate against any employee because of race or sex. Such committees shall report quarterly (or more than quarterly if required by specific matters) to the mayor or his designee. In appointing the members of such committees the City shall insure that there are at least two blacks and one female among the members of each such committee. Each committee member shall be

compensated for committee work at the same rate the committee member receives in his or her job with the City.

XVI. INDIVIDUAL RELIEF

A. Relief for Named Private Plaintiffs

33. The individual named plaintiffs in the *Martin* case, (filed on January 7, 1974) are John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wander Thomas, Eugene Thomas, and Charles Howard. The City of Birmingham agrees to provide the following relief for the named plaintiffs in the *Martin* case, without awaiting any further action by the Personnel Board.

a. Ida McGruder alleged in the complaint in the *Martin* case that the City of Birmingham discriminated against her on the basis of race in failing to hire her to a position as a key punch operator after she was certified to that position as qualified by the Personnel Board on several occasions in 1973. The position of key punch operator is now known as data entry operator. The City of Birmingham agrees to hire Ida McGruder to the first data entry operator vacancy which occurs after final approval of this Decree by this Court. Ms. McGruder's remedial City seniority date and adjusted classification seniority date shall be May 1, 1973. Ms. McGruder shall also receive back pay relief as provided in paragraph 34a of this Decree. At the time Ms. McGruder fills a data entry operator vacancy with the City, she shall be paid at the highest pay step for that classification.

b. Major Florence claims he was discriminated against on the basis of race in that he has been denied promotional opportunities in the Streets and Sanitation Department by the City and the Personnel Board. The City agrees to promote Mr. Florence to the position of public works supervisor as provided in paragraph 47a and Appendix C of this Decree. Mr. Florence's adjusted classification seniority date for public works supervisor shall be June 3, 1974. Mr. Florence shall also receive back pay relief as provided by paragraph 34a of this Decree.

c. Sam Coar alleged in the complaint that he was discriminatorily discharged from the Streets and Sanitation Department of the City of Birmingham in 1972 after 8 years of employment as an unclassified laborer. The City of Birmingham agrees to hire Sam Coar to a position as a truck driver in the Streets and Sanitation Department for the first truck driver vacancy which occurs after final approval of this Consent Decree by this Court. At the time Mr. Coar fills a truck driver vacancy with the City, he shall be paid at the highest step for that classification. Mr. Coar's remedial city seniority date shall be March 3, 1964, the date Mr. Coar entered the unclassified service of the City of Birmingham. Mr. Coar's adjusted classification seniority date for truck driver shall be January 1, 1973. Mr. Coar shall also receive back pay relief pursuant to paragraph 34a of this Decree.

d. Eugene Thomas alleged in the complaint that he was denied a position as a police officer with the City of Birmingham because of race. The City of Birmingham agrees to hire Mr. Thomas for the first police officer vacancy which occurs after final approval of this Decree,

provided that Mr. Thomas satisfactorily passes the standard physical examination for the police officer position. Mr. Thomas shall also receive back pay relief as provided in paragraph 34a of this Decree. Mr. Thomas' remedial city seniority and adjusted classification seniority shall date from July 1, 1973. At the time Mr. Thomas fills a police officer vacancy with the City under this Decree, he shall be paid at the highest pay step for that classification.

e. John W. Martin alleged in the complaint that he was rejected for the position of security guard with the City of Birmingham because of race, after he had been certified by the Personnel Board as qualified for that position. Mr. Martin was subsequently hired by the City of Birmingham in another position. Mr. Martin shall receive back pay relief as provided in paragraph 34a of this Decree, but waives any claim to any other individual relief.

f. Charles Howard alleged in the complaint that he was denied a position as a firefighter with the City of Birmingham because of the racially discriminatory firefighter test. Mr. Howard shall receive back pay relief as provided in paragraph 34a of this Decree, but waives any claim to any other relief.

g. Wanda Thomas claims she was discriminated against by Jefferson County, not by the City of Birmingham. She therefore does not seek any relief against the City of Birmingham.

Each of the individual named plaintiffs, with the exception of Wanda Thomas, agrees to sign the release contained in Appendix E of this Decree. The plaintiffs do

not waive any claims they may have for monetary relief or any other relief to which they may be entitled against any other defendants in these or any other actions.

B. Back Pay and Other Individual Relief In The Actions Brought By the United States and Private Plaintiffs

34. The City agrees to pay the sum of $265,000 in full and complete settlement of the claims against the City of Birmingham for monetary relief in these consolidated actions. Any back pay awards to be made from such sum shall be subject to income tax withholding and the employee's share of social security. Within sixty-five (65) days after provisional approval of the Consent Decree by the District Court, or final approval of the Decree by the Court, whichever occurs first, the City agrees to pay the sum of $265,000 in full and complete settlement of the claims against the City of Birmingham for monetary relief in these consolidated actions. This sum shall be deposited in separate trust accounts bearing interest at commercial rates as follows:

a. A fund in the total amount of $30,000 shall be set aside for the individual private plaintiffs referred to in paragraph 33. Within ten (10) days after the date this Decree is given final approval by the Court, the Clerk shall pay the following amounts to the following named plaintiffs, together with the interest accrued thereon.

Major Florence	$8,500
Ida McGruder	$6,500
Sam Coar	$6,500
Eugene Thomas	$4,000

John Martin	$3,500
Charles Howard	$1,000

These amounts shall be in full satisfaction of all claims of the named plaintiffs for monetary relief against the City of Birmingham in these consolidated actions including claims they may have as members of any of the subclasses.

b. A fund in the total amount of $5,000.00 shall be set aside for the members of Subclass No. 1 in Appendix C (the Police and Fire test subclass). Members of this subclass shall also be eligible for back pay relief under the Personnel Board Decree.

c. A fund in the total amount of $65,000.00 shall be set aside for the members of Subclass No. 2 in Appendix C (the Unclassified Service subclass).

d. A fund in the total amount of $137,000.00 shall be set aside for the members of Subclass No. 3 in Appendix C (the Streets and Sanitation promotional subclass).

e. A fund in the total amount of $6,000.00 shall be set aside for the members of Subclass No. 4 (the Policewomen subclass).

f. A fund in the total amount of $22,000.00 shall be set aside for the members of Subclass No. 5 (the Rejected Applicant subclass).

The amounts described in paragraphs b through f above, together with the interest accrued thereon, shall be paid to members of the appropriate subclasses as described in Appendix D. Payments from these separate funds shall be pursuant to Court order.

35. The amount of back pay relief allocated for each subclass listed in appendix C has been determined by a calculation of the relative economic injury suffered by each of the sub-classes. The amount of individual back pay relief for subclass members will be determined as described in Appendix D after the individual subclass members submit proof of claim forms in accordance with the provisions of paragraph 36 below.

36. Within ten (10) days after the Court gives final approval to the Consent Decree, written notice will be given by the City by certified mail, return receipt requested, to each of the members of the subclasses identified in Appendix C. Notice to such individuals will be sent to their last known address. The form of the notice is attached as Appendix G. Proof of claim forms (attached as Appendices H through L) will be included with the individual notice to class members. Each subclass member shall have sixty (60) days from the date of mailing to respond to this notice and to file his or her proof of claim form with the Clerk of the Court.

37. Within forty-five (45) days after receipt of all timely proof of claim forms, counsel for the plaintiffs will submit to the Court and counsel for the City a report listing each subclass member who, in their view, is entitled to participate in the individual relief provisions of this Consent Decree. In preparing this report counsel for the plaintiffs shall be allowed access to the City's records and files after reasonable notice of no less than three (3) days, and any review of such records and files shall occur during normal working hours. Plaintiffs shall include a description of the job offer and remedial seniority, if any, to be offered by the City to the subclass member and the

monetary relief, if any, to be afforded by the City to such person. In no event will the sum of the individual monetary awards to be paid by the City of Birmingham to the members of the sub-classes identified in Appendix C, and to individual private plaintiffs identified in paragraph 33, exceed the sum of $265,000, plus any interest accrued thereon.

38. The City shall have ten (10) days from receipt of the plaintiffs' report on individual relief to notify, in writing, counsel for the plaintiffs of any objection(s) it may have to the job offer and/or seniority dates for the individuals identified in such report. If there is any such objection(s), the parties shall first attempt to reach a voluntary resolution of the matter(s). In the event the parties are unable to resolve such objection(s), they may petition the court for a resolution of such objection(s). The City agrees not to challenge any of the individual back pay awards to be made under this Consent Decree.

39. Remedial City seniority date, as that term is used in this Decree, shall mean the employee's seniority for purposes of promotion, vacation as accrued, sick leave, and longevity pay, but such date shall not be utilized for pension purposes. However, employees with remedial City seniority dates may elect, if state law permits, to pay into the City's pension system the amount of money the employee would have paid into the system had such employee been in active uninterrupted service with the City from such remedial date. Such election must be made and the required sum of money paid into the pension fund within six (6) months after the date the employee enters the City's service under the provisions of this decree or, in the case of current City employees,

within six (6) months of their being notified that the Court has given final approval to their remedial seniority rights under this Decree. Adjusted classification seniority, as that term is used in this Decree, shall mean the employee's seniority for layoff and recall in the jobs to be offered to individuals under Part XVI of this Decree.

40. Upon final determination of the awards of individual relief to be made under this Decree, the City of Birmingham shall within five (5) days thereafter notify by certified mail each of the subclass members who filed a timely request to be considered for individual relief of their proposed awards of relief, if any, as set forth in the plaintiffs' report submitted to the Court. This notice shall also inform each of these individuals of their right to object to the relief, if any, as contained in the report, and that they must file their objections in writing with the Clerk of the Court within fifteen (15) days of their receipt of this notice.

41. If any such objections are filed, the Court shall thereafter, and as soon as practicable, schedule a hearing at which it will rule upon any objections to the report which have been timely filed. At the conclusion of such hearing the Court shall determine whether to give final approval or disapproval to the awards of individual relief.

C. Implementation of Individual Relief

42. Immediately upon final approval by the Court of the awards of individual relief for subclass members to

be made under this Decree, the City will begin to implement part XVI of this Decree as described herein. However, the City shall implement the relief for the named private plaintiffs as provided in paragraphs 33(a) through 33(f) of this Decree.

43. Any person entitled to individual relief (including the named private plaintiffs), in order to obtain such relief, must sign a notarized release which will be provided [sic] that person by the City (Appendix E) and return such notarized release to the City within thirty (30) days of that person's receipt thereof. Any such individual who either does not sign such a notarized release or, alternatively, and absent good cause, does not return such signed notarized release to the City within thirty (30) days of that person's receipt thereof shall be deemed to have waived his or her entitlement to such relief. Such release shall provide that the relief to which that person is entitled under part XVI of this Decree, if accepted, shall be in full and final settlement of any and all claims against the City of Birmingham based upon allegations of race or sex discrimination occurring prior to the date such release is signed. Such release shall be in the form exemplified by Appendix E attached hereto, or such other form upon which the plaintiffs and the City may agree and the Court approve.

44. The City of Birmingham shall send a notice to each of the subclass members entitled to individual relief informing them that the Court has given final approval to their right to such relief under this Decree. This notification shall be in writing, be made by certified mail, return receipt requested, and shall be approved as a substance and form by the plaintiffs prior to mailing. Included with

such notice will be a copy of this Decree and the release from as described in paragraph 43 above. With respect to those individuals who are eligible for consideration to fill a future vacancy in a classified service position, the notice shall clearly and specifically inform such persons of the qualification requirements they will have to meet in order to be appointed to that position. Such notification also shall state that if the recipient has any questions abut the notice, he or she may contact the Affirmative Action Officer, the Director of Personnel for the City or counsel for the plaintiffs whose names, addresses and phone numbers shall be listed in the notice, or their own counsel.

45. As the City receives releases from the named private plaintiffs the subclass members entitled to a back pay award under this Decree, it shall apply to the Court for orders directing the Clerk of the Court to issue checks to such persons in the amount of his or her back pay award.

46. Subject to the provisions of paragraph 47a, each of the persons who are determined to be entitled to an offer of employment with the City pursuant to the plaintiffs' report as set forth in paragraph 37, shall be entitled to priority appointments to future vacancies in such positions in the order provided in plaintiffs' report.

47a. The individuals named in Appendix C as members of sub-class 3 are blacks who the parties have already determined are entitled to priority promotional opportunities in the Streets and Sanitation Department. Immediately upon final approval of this Consent Decree by the Court, those individuals shall be deemed by the

City to be qualified for promotion to the jobs listed next to their names in the Appendix. The City agrees to promote these individuals to the first permanent full time vacancies which occur in the job listed next to their names after the Court grants final approval to this Decree. Where two or more persons named in this subclass are entitled to fill a future vacancy in the same position, priority of appointments shall be determined by the date of hire seniority dates listed next to their names in that Appendix.

47b. Except for the individuals who are named as members of subclass 3 in Appendix C who are eligible for priority promotional opportunity in the Streets and Sanitation department, each individual entitled to a job offer under this Decree and pursuant to the plaintiffs' report shall be required satisfactorily to demonstrate his or her qualifications for the job to be offered in accordance with the current qualification requirements for the job as established by the City and the defendants Jefferson County Personnel Board, provided that such requirements are administered in a nondiscriminatory manner, do not unlawfully discriminate either in purpose or effect against blacks or women, and do not otherwise conflict with the provisions of paragraph 1 of this Decree. The City agrees to waive any age requirements which may currently bar any such individual from obtaining employment with the City if such individual met such age requirements at the time of application. No such class member shall be required to pass any test or meet any other qualification standard which has been shown to have an adverse impact on blacks or women.

XVIII [sic]. NOTICE AND FAIRNESS HEARING

48a. Within ten (10) days after provisional approval of this Consent Decree by the Court, notice, in the form attached as Appendix F-1, will be issued by publication in the Sunday edition of the Birmingham News for two consecutive weeks, and in the Birmingham Times on one weekday directed to all interested persons informing them of the general provisions of the Decree and of their right to review a copy of the Decree which will be on file with the Clerk of the Court. Within this same ten (10) day period, individual notice will also be given of the general provisions of this Decree by the City to the subclasses identified in Appendix C. The cost of mailing and publication of any notices to be made under this Decree shall be paid by the City. The form of this notice is attached as Appendix F-2. Both the notices by publication and the individual notices shall inform persons to whom such notices are directed of their right to be heard and to file objections, if any, to this Decree. Such objections must be filed with the Clerk of the Court by a date to be set by the Court in its Order granting provisional approval to this Decree. The Court shall thereafter, and on a date(s) to be fixed by the Court in its Order granting provisional approval to the Decree, schedule a fairness hearing at which those persons who file timely objections to the Decree will be heard. At the close of such hearing, or as soon as practicable thereafter, the Court shall rule upon such objections and grant final approval or disapproval to this Consent Decree. The Court shall, however, withhold final approval of the awards of individual relief to be made under this Decree, except the relief to be granted the individual named plaintiffs in the *Martin* case and the

offers of promotion to be made to individuals named in Appendix C, until those class members who file a timely response to the notice of right to present a claim for relief under paragraph 36 above, are notified of their individual awards, if any, and are afforded an opportunity to be heard and to file any objections they may have to those awards.

48b. In the event there are objections to the Consent Decree which the Court overrules, the Court shall not implement the Decree until thirty days after the entry of an Order finally approving the Decree.

XVIII. RECORDKEEPING

49. The City shall retain during the period of this Decree necessary records concerning the implementation of this Decree. These records shall be made available to the plaintiffs for inspection and copying upon written request.

50. The City's records shall include the following:

(a) A list of all organizations and schools which are contacted for recruitment purposes, showing the date that any notice of job opportunity was mailed to them, the position and number of positions to be filled from that notice, and the date through which applications could be received for the job which was advertised, including a summary or compilation of all other recruitment efforts aimed at minorities and women, together with the date of said efforts and the names and positions of the City's employees who made the contact and the nature of the contact.

(b) All written applications and related records for all persons seeking employment with the City, including applications for transfer or promotion within or among departments, for a period of at least five (5) years, and shall include on such applications identification of the applicant by race and sex. Such records shall also contain a statement of the reasons why any applicant was found not to be qualified for the position(s) applied for.

(c) With respect to any applicant who is certified for hire or promotion and who is not selected for the vacancy for which that applicant is certified, the City shall record in writing the reason(s) for the applicant's not being selected for that vacancy. Also, the City shall record and maintain any other written records or comments on an applicant for certification in accordance with paragraph 31(e) above.

(d) All written communications between the City and applicants for employment, transfer and promotion.

(e) All written communications between the City and employees concerning discipline and discharge, as well as all written reports concerning these matters.

XIX. REPORTING

51. Within ten days after adoption of the City's annual affirmative action plans and reports for each department, the City shall furnish a copy of every plan and report to the plaintiffs.

52. Within 60 days of the entry of this decree and thereafter semi-annually, the City shall report to the plaintiffs, the following information:

(a) A summary showing the total number of employees by race and sex in each job classification for each department of the City in both the classified and unclassified service.

(b) A list of all probational appointments for permanent full-time positions, by job classification and department, during the reporting period indicating the race and sex of the persons hired or promoted.

53. Within 60 days of the entry of this Decree and thereafter on an annual basis, the City shall report to the plaintiffs the following information:

(a) A list of all persons, by job classification, department, race and sex, to whom positions have been offered and whether or not the positions were accepted.

(b) A list of all promotions to permanent full-time positions in the classified service, by job classification and department, during the reporting period indicating the race, sex, date of initial hire in the classified service and date of the promotion.

(c) A breakdown of the applicant flow for employment with the City which indicates by race and sex the number of applicants for each department and job classification in the classified and unclassified service, and the number of applicants hired, rejected and pending for each job classification and department. Applicant

hires shall be separately identified as to Comprehensive Employment Training Act (CETA) positions.

(d) A summary report of the recruiting activities conducted by the City and the results of those activities.

(e) A report of the City's implementation of the individual relief provisions of this Decree. This report shall include a statement of the monetary payments, if any, that have been made to individuals entitled to such relief. This report shall further identify each individual who has been offered a job with remedial seniority under this Decree, and whether the job offer was accepted or rejected. For any individual who was disqualified from an offer of employment under Part XVI of this decree, a specific statement of the reasons for disqualification shall be included in this report.

(f) A list of the sworn personnel terminated from either the Police Department or the Fire Department, identifying each individual by race, sex, date of hire, date of termination, probational or permanent status, and rank. In addition, the report shall explain the reason each individual was terminated.

(g) Within thirty (30) days of establishment or revision, a copy of the written policy concerning background investigations required by paragraph 27.

XX. EFFECT OF COMPLIANCE

54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the

City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981 and §1983, and the Fourteenth Amendment to the Constitution of the United States as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provision of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law.

XXI. RETENTION OF JURISDICTION

55. The Court retains jurisdiction of this action for such further relief or other orders as may be appropriate. At any time after six (6) years subsequent to the date of the entry of the Consent Decree, any party may more the Court upon forty-five (45) days notice to the other, to dissolve this Consent Decree. In considering whether the Consent Decree shall be dissolved, the Court will take into account whether the purposes of this Consent Decree have substantially been achieved.

Entered and Ordered this 8 day of June, 1981.

/s/ Pointer
UNITED STATES
DISTRICT JUDGE

AGREED AND CONSENTED TO:

For Plaintiff United States	DATED:
/s/ Richard J. Ritter	May 19, 1981
For the Plaintiffs in *Martin, et al.* v. *City of Birmingham, et al.*	
/s/ Susan W. Reeves/Stephen L. Spitz	May 19, 1981
For the Plaintiffs in *Ensley Branch of the N.A.A.C.P., et al.* v. *Seibels, et al.*	
/s/ Oscar W. Adams, III	May 19, 1981
For the Defendant City of Birmingham	
/s/ James K. Baker	May 19, 1981

Appendix A

Group I – Engineering Department

1. Professionals:
   - (1) Graduate Engineer
   - (2) Sr. Graduate Engineer
   - (3) Airplane Fac. Engineer
   - (4) Sr. Civil Engineer
   - (5) Chief Civil Engineering
   - (6) Chief Design Engineering
2. Technicians:
   - (1) Civil Engineer
   - (2) Engineering Technician
   - (3) Sr. Engineering Technician
   - (4) Chief of Party
   - (5) Engineering Inspector
   - (6) Sr. Engineering Inspector
   - (7) Construction Cost Analyst

(8) Media Spec.
(9) Engineering Drafter
(10) Sr. Engineering Drafter
(11) Sr. Row Agent

Group II – Finance Department

1. Professionals:
   (1) Sr. Auditor
   (2) Sr. Accountant
   (3) Principal Accountant
   (4) Chief Accountant
   (5) Accountant
   (6) Auditor
   (7) Revenue Examiner

Group III – Inspection Services Department

1. Technicians: (other than Building Inspectors)
   (1) Maintenance Mechanic
   (2) Electrical Inspector
   (3) Chief Electrical Inspector
   (4) Elevator Inspector
   (5) Chief Elevator Inspector
   (6) Plumbing Inspector
   (7) Gas Inspector
   (8) Chief Pl/Gas Inspector
   (9) Chief Building Inspector
   (10) Zoning Inspector
   (11) Weights & Measures Inspector
   (12) Sr. Weights & Measures Inspector
2. Skilled Craft Worker:
   (1) Maintenance Mechanic
   (2) WWTF Maintenance Worker
   (3) Cabinet Maker
   (4) Plumber

(5) Refrigerator & Heating Mechanic
(6) Painter
(7) Painter Supervisor
(8) Electrician

Group IV – Traffic Engineering Department

1. Technicians:
   (1) Traffic Planning Technician
   (2) Sr. Traffic Planning Technician
   (3) Traffic Analyst
   (4) Traffic Construction Supervisor
   (5) Supv. of Traffic Construction Supervisor
   (6) Traffic Operators Supervisor
   (7) Street Light Inspector

Group V – Office of Housing

1. Professionals:
   (1) Housing Rehabilitation Specialist
   (2) Sr. Housing Rehab.
   (3) Pr. Housing Rehab.
   (4) Housing Relocation Officer

Appendix B

Group I – Police Department

1.	Protective Service:	(1) Police Officer

Group II – Police Department

1.	Protective Service:	(1) Police Sergeant

Group III – Fire Department

1.	Protective Service:	(1) Firefighter (2) Fire Prevention Inspector (3) Fire Communication Operator

Group IV – Engineering Department

1.	Professionals:	(1) Graduate Engineer (2) Sr. Graduate Engineer (3) Airplane Fac. Engineer (4) Sr. Civil Engineer (5) Chief Civil Engineering (6) Chief Design Engineering
2.	Technicians:	(1) Civil Engineer (2) Engineering Technician (3) Sr. Engineering Technician (4) Chief of Party (5) Engineering Inspector (6) Sr. Engineering Inspector (7) Construction Cost Analyst (8) Media Spec. (9) Engineering Drafter (10) Sr. Engineering Drafter

		(11) Sr. Row Agent
3.	Para-Professionals:	(1) Engineering Aide
		(2) Sr. Engineering Aide

Group V – Inspection Services Department

1.	Professionals:	(1) Architect
		(2) Architect Drafter
		(3) Plans Examiner
		(4) Zoning Coordinator
2.	Technicians:	(1) Communications Technician
		(2) Electrical Inspector
		(3) Chief Electrical Inspector
		(4) Elevator Inspector
		(5) Chief Elevator Inspector
		(6) Plumbing Inspector
		(7) Gas Inspector
		(8) Chief Pl/Gas Inspector
		(9) Building Inspector
		(10) Chief Building Inspector
		(11) Zoning Inspector
		(12) Weights & Measures Inspector
		(13) Sr. Weights & Measures Inspector
3.	Skilled Craft Worker:	(1) Maintenance Mechanic
		(2) Auto Mechanic
		(3) WWTF Maintenance Worker
		(4) Cabinet Maker
		(5) Plumber
		(6) Plumber
		(7) Painter

(8) Painter Supervisor
(9) Electrician

Group VI – Municipal Garage

1. Skilled Craft Worker:
   (1) Auto Mechanic
   (2) Auto Shop Supervisor
   (3) Auto Repair Expert
2. Service/Maintenance Worker:
   (1) Service Station Attendant
   (2) Equipment Service Worker
   (3) Sr. Equipment Service Worker
   (4) Auto Mechanic Helper
   (5) Building Service Worker
   (6) Laborer

Group VII – Office of Housing

1. Professionals:
   (1) Housing Rehabilitation Specialist
   (2) Sr. Housing Rehab.
   (3) Pr. Housing Rehab.
   (4) A/HCUS Rehab. Officer
   (5) Housing Relocation Officer

Group VIII – Streets & Sanitation

1. Technicians:
   (1) Sanitation Inspector
   (2) Sr. Sanitation Inspector
   (3) Street Paving Spec.
2. Service Maintenance Worker:
   (1) Driver Messenger
   (2) Dist. Sit. Attn.
   (3) Truck Driver
   (4) Semi-skilled laborer
   (5) Shop Helper
   (6) Guard

(7) Building Service Worker
(8) Laborer
(9) Refuse Collector

Group IX – Traffic Engineering

1. Professionals:	(1)	Traffic Systems Engineer
	(2)	Sr. Traffic Systems Engineer
2. Technicians:	(1)	Traffic Planning Technician
	(2)	Sr. Traffic Planning Technician
	(3)	Traffic Analyst
	(4)	Traffic Control Supervisor
	(5)	Supv. Traffic Control Supervisor
	(6)	Traffic Opns. Supervisor
	(7)	Street Light Inspector
3. Skilled Craft Worker:	(1)	Traffic Signals Markings Worker
	(2)	Traffic Signals Markings Crew Leader
	(3)	Laborer
4. Service/ Maintenance Worker:	(1)	Traffic Signs, Signals & Markings Workers
	(2)	Traffic Signs, Signals & Markings Crew Leader

Group X – Parks & Recreation

1. Skilled Craft Worker:	(1)	Maintenance Mechanic
	(2)	Park Maintenance Supervisor
	(3)	Park Maintenance Supt.
	(4)	Mason

		(5) Carpenter
		(6) Plumber
		(7) Painter
		(8) Sign Painter
		(9) Painter Supervisor
		(10) Electrician
2.	Service/ Maintenance Worker:	(1) Zookeeper
		(2) Truck Driver
		(3) Semi-skilled Laborer
		(4) Shop Helper
		(5) Stadium Maintenance Supervisor
		(6) Greenhouse Worker
		(7) Gardener
		(8) Landscape Supervisor
		(9) Hort. Dist. Supv.
		(10) Guard
		(11) Maintenance Repair Worker
		(12) Laborer
		(13) Refuse Collector

Group XI – Parking Authority

1.	Protective Service:	(1) Security Officer

APPENDIX C

Subclass No. 1

All black persons who took the 10-C Policeman Test which resulted in the eligibility lists for police officers in the City of Birmingham which were in effect between April 25, 1975, and January 10, 1977, and the 20-B Firefighter Test which resulted in the eligibility lists for firefighters in effect between July 8, 1976, and January 10, 1977, who have not been hired for police officer or firefighter positions by the City of Birmingham or who subsequent to the entry of this Court's Order on January 10, 1977, were hired by the City of Birmingham but who may have been hired earlier but for their rank on such eligibility lists.

Subclass No. 2

All blacks who prior to the entry of this Decree were hired and assigned to laborer positions in the unclassified service of the City of Birmingham who, at any time after March 24, 1972, worked as laborers in the unclassified service and who prior to the entry of this Decree, were reclassified in to the classified service. Listed below are named individuals who the parties to this Decree acknowledge are properly members of this subclass. Additional names may be added to this subclass pursuant to the provisions of paragraph 36 of this Decree:

Birmingham Streets and Sanitation Department

1. James Addie
2. Burnice Anthony
3. Willie Allen
4. Johnnie Bridges
5. Johnny Brown
6. Eugene Carlton
7. Elmo Carter
8. John Carter
9. Herman Copes
10. Otis Dickerson
11. John Foster
12. Rickey K. Graham
13. Roy Harris
14. Melvin Harris
15. Emmitt Hicks
16. Adam Horne
17. David Horton
18. James Hudson
19. Alex Huggins
20. Bruno Huggins, Jr.
21. Norman Jackson
22. Houston Kennedy
23. Curtis W. King
24. Avance Lomax
25. James Lowery
26. Robert Lowery
27. Carl E. Morris
28. Elbert Muse
29. Trennon Nickerson
30. Henry Paige
31. Earnest Perry
32. Sammie Robinson
33. Edgar Sanders
34. Anthony Scales
35. James Shuford
36. Gus Smith
37. Jessie Staten
38. Otis Taylor
39. Winston Thomas
40. Wilson Tucker
41. Morris Weatherly
42. Willie Wells
43. Richard Whitaker
44. I.C. Williams

Birmingham Traffic Engineering

45. Larry W. Belle
46. Darryl Cobb
47. Andrew Davis
48. John Rancher
49. Henry Ray
50. Antonia J. Slaughter
51. Lee Walker
52. John Webb
53. Larry Webb

Birmingham Municipal Garage

54. Andrew L. Goodin
55. Charlie James
56. Fred Powell
57. Bobby J. Thomas
58. Wilbert Williams

Birmingham Parks and Recreation

59. D.C. Banks
60. Calvin Davis
61. David S. Handley
62. Augusta L. Jones
63. Melvin Webb
64. Herman Z. Whitehead
65. Caldwell Wright

Birmingham Building Maintenance

66. Abe Riggins, Jr.

Birmingham Fire Administration

67. John H. Hutchings

Subclass No. 3

All blacks who were denied promotional opportunities in the Streets and Sanitation Department of the City of Birmingham at any time after March 24, 1972. Listed below are named individuals who the parties to this Decree acknowledge are properly members of this subclass. Additional names may be added to this subclass pursuant to the provisions of paragraph 36 of this Decree.

Name	Date of of Hire	Job
1. Charles Jordan	03/10/76	Construction Equipment Operator
2. Trennon Nickerson	09/15/66	Construction Equipment Operator
3. Roosevelt Parker	06/01/72	Construction Equipment Operator
4. Mose Shine, Jr.	04/24/67	Construction Equipment Operator
5. Charles Boyd	12/03/63	Labor Supervisor
6. Herman Copes	04/21/60	Labor Supervisor
7. Avance Lomax	06/29/70	Labor Supervisor
8. Samuel Bandy	12/28/61	Public Works Supervisor
9. A. B. Campbell	04/03/71	Public Works Supervisor
10. Willie Cargill	04/02/66	Public Works Supervisor
11. Major Florence	12/26/68	Public Works Supervisor
12. Willie Gossum	03/22/72	Public Works Supervisor
13. Clyde Hill	05/12/61	Public Works Supervisor
14. Arthur Jones	12/23/71	Public Works Supervisor
15. Cleo Lewis	12/27/71	Public Works Supervisor
16. Alfred Menfield	04/05/74	Public Works Supervisor

17.	Orman Skinner	11/17/69	Public Works Supervisor
18.	James Parker, Jr.	10/18/60	Refuse Truck Driver
19.	Charlie Simmons	07/02/73	Refuse Truck Driver

Subclass No. 4

All women who prior to May 27, 1975, were hired by the City of Birmingham as traffic citation officers or policewomen and who on and after March 24, 1972, were assigned to the youth aid division of the City police department. Listed below are named individuals who the parties to this Decree acknowledge are properly members of this subclass. Additional names may be added to this subclass pursuant to the provisions of paragraph 36 of this Decree.

1. Betty Jensen
2. Annalee Saunders

Subclass No. 5

All black persons who were certified by the Personnel Board for positions with the City of Birmingham in the police department as police officers, key punch operators, or clerk typists, or in the finance department as clerk typists or intermediate clerks, but who were not hired for those positions by the City of Birmingham during the period from March 24, 1972, through January 7, 1974.

APPENDIX D

The allocation of back pay amounts among the members of each subclass listed in Appendix C who file timely proof of claim forms shall be determined according to the following guidelines:

a. Subclass No. 1 – All subclass members will share equally in the back pay allocated to this subclass under the Decree. In addition, individual members of this subclass may be entitled to back pay under the Consent Decree with the Personnel Board. If members of this subclass also applied for a police officer, firefighter, or deputy sheriff position(s) with any other defendant jurisdiction(s) in these consolidated actions, such persons shall not be deemed to have waived any back pay or other rights which they may have against that jurisdiction(s). Back pay may be denied to members of this subclass who refused prior offers of employment with the City as police officers of firefighters.

b. Subclass No. 2 – Members of this subclass shall receive back pay according to the following formula:

    1. A calculation will be made of the difference between the annual pay of each subclass member in the unclassified service at the time of his reclassification and the annual pay he received in a classified service position at the time of reclassification. Some adjustments may be made in individual cases if there is evidence that in individual cases if there is evidence that an unclassified worker

should have been reclassified in a higher paying job than the one he received at the time of reclassification.

2. This difference will be multiplied by the number of years (rounded off to the nearest year) that the subclass member served in the unclassified service between March 24, 1972, and the date the subclass member was reclassified into a classified service position.

3. Each member of this subclass shall receive a proportion of the amount set aside for this subclass in accordance with his relative economic injury as calculated above.

c. Subclass No. 3 – Back pay shall be determined for this subclass according to the merits of the individual claim and the relative economic injury suffered by the claimant. The amount of back pay for a subclass member may vary depending upon the pay rate of the job for which a promotion claim is made, the subclass member's qualifications for promotion and length of service with the City, and any evidence that such individual had previously expressed an interest in obtaining a promotion in the job which is the subject of his claim. Set forth below are the guidelines which will be used for determining individual back pay awards on claims for the jobs listed below. Under each job title is a listing of categories of potential claimants in descending order of priority, i.e. individuals with claims within category 1 will, absent unusual circumstances, receive a larger back pay award

than individuals who have claims which fall within category 2 etc.

No person will be eligible for back pay under more than one category of the job classifications listed below. Back pay awards for persons who file claims for more than one job may [sic] reduced in cases where there is an overlap between the back pay period for the jobs involved. The purpose of any such reduction(s) is to preclude the possibility of a "windfall" or double recovery for such claimant.

Public Works Supervisor And Construction Supervisor

Category No. 1 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, in a permanent, full time position as a Refuse Truck Driver, Heavy Equipment Operator, or Truck Driver in either the classified or unclassified service; and who demonstrate that, at any time between January 1, 1975 and October 31, 1979, they expressed an interest to the City or the Personnel Board in being considered for a promotion to a Public Works Supervisor or Construction Supervisor position.

Category No. 2 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, in a permanent, full time

position as a Refuse Truck Driver, Heavy Equipment Operator or Truck Driver in either the classified or unclassified service.

Category No. 3 This category consists of subclass members who were employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972, and who after that date were employed in a permanent full time position with the City as a Refuse Truck Driver, Heavy Equipment Operator or Truck Driver in either the classified or unclassified service.

Category No. 4 This category consists of subclass members who were employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972, and who accumulated at least ten (10) continuous years of service in the Streets and Sanitation Department as a classified and/or unclassified employee.

Category No. 5 This category shall consist of the claims of any remaining subclass members for these jobs.

Construction Equipment Operator

Category No. 1 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham, and who demonstrate that at any time between March 24, 1972, and October 31, 1979, they performed the work of a Construction Equipment Operator while

classified as a Truck Driver, Semi-skilled Laborer or Unclassified Laborer in the Streets and Sanitation Department of the City.

Category No. 2 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974; who, on or after March 24, 1972, were employed in a permanent full time position as as [sic] a Truck Driver or a Semi-skilled Laborer, and who demonstrate that at any time after March 24, 1972, they expressed an interest to the City or the Personnel Board in being considered for a promotion to a Construction Equipment Operator position.

Category No. 3 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, and who, on or after March 24, 1972, were employed in a permanent full time position as a Truck Driver or a Semi-skilled Laborer.

Category No. 4 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972, who accumulated at least ten (10) years continuous years of service in the Streets and Sanitation Department as a classified and/or unclassified employee.

Category No. 5 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972 who, after that date, were employed in a permanent full time position with the City as a Truck Driver or a Semi-skilled Laborer in either the classified or unclassified service.

Category No. 6 This category consists of the claims of any remaining subclass members for this job.

Labor Supervisor

Category No. 1 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, and who demonstrate that between March 24, 1972, and December 1, 1978, they expressed an interest to the City or the Personnel Board in being promoted to a Labor Supervisor position, and who, at the time they expressed such interest, were employed as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 2 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, and who, between March 24,

1972 and December 1, 1978, were employed in a permanent full time position as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 3 This category consists of subclass members who, on or after March 24, 1972, were employed in the Streets and Sanitation Department of the Cityof [sic] Birmingham, and who worked in a permanent full time position as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 4 This category consists of the claims of any remaining subclass members for this job.

Heavy Equipment Operator

Category No. 1 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since at least January 1, 1974, and who, on or after March 24, 1972, expressed an interest to the City or the Personnel Board in being promoted to a position as a Heavy Equipment Operator, and who, at the time they expressed such an interest, were employed as a Semi-skilled Laborer in either the classified or unclassified service.

Category No. 2 This category consists of subclass members who at any time between March 24, 1972, and July 1, 1978, took the written promotional

examination for Heavy Equipment Operator, and who, prior to January 1, 1979, were not promoted to a permanent, full time vacancy in that job.

Category No. 3 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since at least January 1, 1974, and who, on or after March 24, 1972, were employed in a permanent full time position as a Truck Driver or Semiskilled Laborer in either the classified or unclassified service.

Category No. 4 This category consists of the claims of any remaining subclass members for this job.

Refuse Truck Driver

Category No. 1 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since January 1, 1974, and who, on or after March 24, 1972, can demonstrate that they expressed an interest to the City or the Personnel Board in being considered for a promotion to a Refuse Truck Driver position, and who at the time they expressed such an interest were employed as a Semiskilled Laborer or as a Laborer in the unclassified service.

Category No. 2 This category consists of subclass members who have been continuously employed in the Streets and

Sanitation Department of the City of Birmingham since January 1, 1974, and who, on or after March 24, 1972, were employed in a permanent full time position as a Semi-skilled Laborer or as a Laborer in the unclassified service.

Category No. 3 This category consists of subclass members who, on or after March 24, 1972, were employed by the City of Birmingham as a Semi-skilled Laborer or as a Laborer in the unclassified service, and who accumulated at least ten (10) years continuous service in the Streets and Sanitation Department as a classified and/or unclassified employee.

Category No. 4 This category consists of the claims of any remaining subclass members for this job.

d. Subclass No. 4 – Back pay for members of this subclass shall be based upon the difference in earnings between traffic citation officers and/or police women and police sergeants. Members of this class who demonstrate that on or after March 24, 1972, they were assigned to the Youth Aid Division and performed the same or similar duties as male sergeants in that Division, shall receive a back pay award based upon the number of years worked in the Youth Aid Division on and after March 24, 1972.

e. Subclass No. 5 – Individual back pay for the members of subclass No. 5 shall be computed as follows. The number of actual

vacancies filled by black persons in the positions and departments identified in Appendix C during the period from March 24, 1972, through January 7, 1974, will be subtracted from the number of vacancies in those positions that would have been expected to be filled by black persons if the proportion of black hires approximated the proportion of blacks who were certified for those vacancies during that period. This calculation will determine the black hire differential for each position. Back pay will be distributed to class members on a pro rata basis according to the relative black hire differential among the positions identified in the subclass definition.

Those individuals who turned down an offer for the position to which they were certified, failed to appear for an interview for such position after receiving notice of such interview, or whose pre-employment backgrounds clearly demonstrate that such persons were not minimally qualified for employment for such positions, shall be ineligible for back pay.

APPENDIX E

RELEASE

For and in consideration of the sum of [sum spelled out] Dollars ($___) and all other relief to be provided me by the City of Birmingham pursuant to the provisions of the *Consent Decree With the City of Birmingham* entered by the Honorable _____, United States District Judge, on [date] in the consolidated actions of *United States* v. *Jefferson County, et al.*, Civil Action Nos. 75-P-0666-S, 74-2-17-S, 74-2-12-S, I [full name of claimant], for myself and for my heirs, executors, administrators and assigns hereby release and discharge the City of Birmingham, its Mayor, officials, agents, and employees of and from all legal and equitable claims arising out of the subject matter of these consolidated actions or any other legal, equitable or administrative claims or causes of action arising out of alleged discrimination on the basis of either race or sex by the City of Birmingham, in violation of any Federal, state or local and equal employment opportunity laws, statutes, regulations or ordinances occurring prior to the date of the execution of this Release. I further agree to discontinue any pending claim or action, whether legal, equitable or administrative, alleging race or gender discrimination by the City of Birmingham, its Mayor, and employees except with respect to any questions of attorneys fees and/or costs which may be pending in said actions.

I understand and agree that none of the parties hereby released, nor any other party, admits that I have any just claim against them or anyone else in respect to my said employment with the City of Birmingham, or

application thereof, and that none of the parties hereby released, nor any other party, admits or has admitted liability to me or anyone else on account of any payment herein recited to have been made to me, or otherwise.

I carefully have read this Release as well as the accompanying Consent Decree entered [date]; I fully comprehend and understand that by signing this Release I am releasing my claim for back pay and that I am entitled to no other payment of monies for any claim of employment discrimination prior to the date this Release is executed from the City of Birmingham except as recited herein.

I further certify and warrant that I have had the opportunity to consult an attorney prior to execution of this Release; that I am of lawful age; and, that I am signing this Release of my own free act and deed.

Signed this _____ day of _____, 1981.

/s/ _____
(Signature)

Social Security Number _____

Subscribed and sworn to before me this undersigned authority on this _____ day of _____, 1981, to certify which witness my hand and seal of office.

/s/ _____
NOTARY PUBLIC

_____

APPENDIX F-1

NOTICE OF PROPOSED SETTLEMENT AGREEMENTS AND CONDITIONAL CLASS CERTIFICATION

There are currently before the United States District Court for the Northern District of Alabama proposed partial settlement agreements in the following consolidated employment discrimination actions: *Ensley Branch of the N.A.A.C.P., et al. v. City of Birmingham, et al.* (C.A. No. 74-Z-12-S); *John W. Martin, et al. v. City of Birmingham, et al.* (C.A. No. 74-Z-17-S) and *United States of America v. Jefferson County, et al.* (C.A. No. 75-P-0666-S).

The proposed settlement agreements are in the form of two Consent Decrees. One of the Consent Decrees is between each of the plaintiffs in the above actions and the defendants Jefferson County Personnel Board, its Director and the members of the Board (hereinafter Personnel Board or Board). The other Consent Decree is between these same plaintiffs and the City of Birmingham and its Mayor (hereinafter the City of Birmingham). The Consent Decrees will resolve all of the plaintiffs' claims of employment discrimination against blacks and women by these defendants. The Consent Decrees do not resolve the plaintiffs' claims of employment discrimination by the remaining defendant jurisdictions in these actions. These remaining defendants are: Jefferson County, Jefferson County Health Department, and the cities of Bessemer, Fairfield, Fultondale, Gardendale, Homewood, Hueytown, Midfield, Mountain Brook, Pleasant Grove, Tarrant and Vestavia Hills.

On ___, 1981 the District Court entered an Order granting provisional approval to both Decrees, subject to

further hearings. In that Order the Court withheld final approval of the Consent Decrees until after hearing any objections which may be filed to them, as further explained in Part II of this Notice.

I. Class Certification Ruling

On ___, 1981 the District Court entered an Order pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure in the Ensley Branch and Martin actions. In that Order the Court conditionally certified for purposes of these settlement agreements the following classes of black individuals who may be eligible to present a claim for back pay and other relief under the Consent Decrees.

All black persons who took the 10-C Policeman Test which resulted in the eligibility lists for police officers and deputy sheriffs which were in effect between April 25, 1975 and January 10, 1977, and the 20-B Firefighter Test which resulted in the eligibility lists for firefighters in effect between July 8, 1976, and January 10, 1977, who have not been hired for police officer, deputy sheriff or firefighter positions by any of the defendant jurisdictions in these consolidated actions, or who subsequent to the entry of this Court's Order on January 10, 1977, were hired by any of the defendant jurisdictions but may have been hired earlier but for their rank on such eligibility lists.

2. All blacks who prior to the submission of the Consent Decree with the City of Birmingham to the Court on May 19, 1981 were hired and assigned to laborer

positions in the unclassified service of the City of Birmingham; who, at any time after March 24, 1972, worked as laborers in the unclassified service; and who, prior to the submission of this Decree to the Court, were reclassified into the classified service.

3. All blacks who were denied promotional opportunities in the Streets and Sanitation Department of the City of Birmingham at any time between March 24, 1972 and May 19, 1981, the date of the submission of the Consent Decree with the City of Birmingham to the Court.

4. All black persons who were certified by the Personnel Board for positions with the City of Birmingham in the Police Department as police officers, key punch operators, or clerk typists, or in the Finance Department as clerk typists or intermediate clerks, but who were not hired for those positions during the period from March 24, 1972, through January 7, 1974.

There is also a class of women who are eligible to present a claim for relief under the Consent Decree with the City of Birmingham. This class consists of all women who, prior to May 24, 1975, were hired by the City of Birmingham as traffic citation officers or policewomen and who, on and after March 24, 1972, were assigned to the Youth Aid Division of the City Police Department. The claims of this class are being presented solely as part of the action brought by the United States.

II. Notice of Right To File Objections to the Consent Decrees and Fairness Hearing

This notice is directed to all persons who have an interest which may be affected by the Consent Decrees. Copies of the Decrees and the entire file in this proceeding are on file in the office of the Clerk of the Court for the Northern District of Alabama. They may be examined in the Clerk's office during normal working hours (Mon.-Fri. 8 a.m.-4:30 p.m.). The address of the Clerk's office is 1800 Fifth Avenue North, Birmingham, Alabama 35203. *Any person who wishes to register an objection(s) to either of the Consent Decrees must file such objection(s) in writing with the Clerk of the Court by ___ p.m., ___, 1981. Objections filed after that date will not be considered by the Court in determining whether to grant final approval to the Consent Decrees.*

On ___, 1981, at ___ o'clock the District Court will hold a fairness hearing at which it will consider any timely filed objections to the Consent Decrees. Individual objectors may appear at that hearing with or without the assistance of legal counsel.

III. General Summary of the Consent Decree With The Jefferson County Personnel Board

These Consent Decrees contain a number of general injunctive provisions, including goals for blacks and women, each of which are designed to correct for the effects of any alleged past discrimination and to insure equal employment opportunities for all applicants and employees with the City and in the civil service system administered by the Personnel Board. The Consent

Decrees also provide for back pay relief for certain classes listed above. Details of the general injunctive provisions and the back pay relief are set out in the Consent Decrees, an expanded notice sent to class members, and the court files, all of which are available in the office of the Clerk of the Court, or through the attorneys for the plaintiff classes, whose names and addresses are as follows:

Attorneys for the United States:

Richard J. Ritter
United States Department of Justice
Civil Rights Division
Federal Enforcement Section
Room 4517
Washington, DC 20530
(202) 633-4086

Caryl Privett
Assistant United States Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, Alabama 35203
(205) 254-1785

Attorneys for the Plaintiffs in Martin, et al. v. the City of Birmingham:

Stephen L. Spitz
Lawyers Committee for
Civil Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, DC 20005
(202) 628-6700

Susan Reeves
Reeves & Still
2027 First Avenue North
Suite 400
Birmingham, AL 35203
(205) 322-7479

Attorney for the Plaintiffs in NAACP v. Seibels:

Oscar William Adams, III
1600 2121 Building
Birmingham, AL 35203
(205) 324-4445

APPENDIX F-2

NOTICE OF PROPOSED SETTLEMENT AGREEMENTS AND CONDITIONAL CLASS CERTIFICATION

There are currently before the United States District Court for the Northern District of Alabama proposed partial settlement agreements in the following consolidated employment discrimination actions: *Ensley Branch of the N.A.A.C.P., et al. v. City of Birmingham, et al.* (C.A. No. 74-Z-12-S); *John W. Martin, et al. v. City of Birmingham, et al.* (C.A. No. 74-Z-17-S) and *United States of America v. Jefferson County, et al.* (C.A. No. 75-P-0666-S).

The proposed settlement agreements are in the form of two Consent Decrees. One of the Consent Decrees is between each of the plaintiffs in the above actions and the defendants Jefferson County Personnel Board, its Director and the members of the Board (hereinafter Personnel

Board or Board). The other Consent Decree is between these same plaintiffs and the City of Birmingham and its Mayor (hereinafter the City of Birmingham). The Consent Decrees will resolve all of the plaintiffs' claims of employment discrimination against blacks and women by these defendants. The Consent Decrees do not resolve the plaintiffs' claims of employment discrimination by the remaining defendant jurisdictions in these actions. These remaining defendants are: Jefferson County, Jefferson County Health Department, and the cities of Bessemer, Fairfield, Fultondale, Gardendale, Homewood, Hueytown, Midfield, Mountain Brook, Pleasant Grove, Tarrant and Vestavia Hills.

On ___, 1981 the District Court entered an Order granting provisional approval to both Decrees, subject to further hearings. In that Order the Court withheld final approval of the Consent Decrees until after hearing any objections which may be filed to them, as further explained in Part II of this Notice.

I.

Class Certification Ruling

On ___, 1981 the District Court entered an Order pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure in the *Ensley Branch* and *Martin* actions. In that Order the Court conditionally certified for purposes of these settlement agreements the following classes of black individuals who may be eligible to present a claim for back pay and other relief under the Consent Decrees.

1. All black persons who took the 10-C Policeman Test which resulted in the eligibility lists for police officers and deputy sheriffs which were in effect between April 25, 1975 and January 10, 1977, and the 20-B Firefighter Test which resulted in the eligibility lists for firefighters in effect between July 8, 1976, and January 10, 1977, who have not been hired for police officer, deputy sheriff or firefighter positions by any of the defendant jurisdictions in these consolidated actions, or who subsequent to the entry of this Court's Order on January 10, 1977, were hired by any of the defendant jurisdictions but may have been hired earlier but for their rank on such eligibility lists.

2. All blacks who prior to the submission of the Consent Decree with the City of Birmingham to the Court on May 19, 1981 were hired and assigned to laborer positions in the unclassified service of the City of Birmingham: who, at any time after March 24, 1972, worked as laborers in the unclassified service; and who, prior to the submission of this Decree to the Court, were reclassified into the classified service.

3. All blacks who were denied promotional opportunities in the Streets and Sanitation Department of the City of Birmingham at any time between March 24, 1972 and May 19, 1981, the date of the submission of the Consent Decree with the City of Birmingham to the Court.

4. All black persons who were certified by the Personnel Board for positions with the City of Birmingham in the Police Department as police officers, key punch operators, or clerk typists, or in the Finance Department

as clerk typists or intermediate clerks, but who were not hired for those positions during the period from March 24, 1972, through January 7, 1974.

There is also a class of women who are eligible to present a claim for relief under the Consent Decree with the City of Birmingham. This class consists of all women who, prior to May 24, 1975, were hired by the City of Birmingham as traffic citation officers or policewomen and who, on and after March 24, 1972, were assigned to the Youth Aid Division of the City Police Department. The claims of this class are being presented solely as part of the action brought by the United States.

II.

Notice of Right To File Objections to the Consent Decrees and Fairness Hearing

This notice is directed to all persons who have an interest which may be affected by the Consent Decrees. Copies of the Decrees and the entire file in this proceeding are on file in the office of the Clerk of the Court for the Northern District of Alabama. They may be examined in the Clerk's office during normal working hours (Mon.-Fri. 8 a.m.-4:30 p.m.). The address of the Clerk's office is 1800 Fifth Avenue North, Birmingham, Alabama 35203. *Any person who wishes to register an objection(s) to either of the Consent Decrees must file such objection(s) in writing with the Clerk of the Court by ___ p.m., ___, 1981. Objections filed after that date will not be considered by the Court in determining whether to grant final approval to the Consent Decrees.*

On ___, 1981, at ___ o'clock the District Court will hold a fairness hearing at which it will consider any timely filed objections to the Consent Decrees. Individual objectors may appear at that hearing with or without the assistance of legal counsel.

III.

General Summary of the Consent Decree With The Jefferson County Personnel Board

This Consent Decree contains a number of general injunctive provisions each of which are designed to insure equal employment opportunities for all applicants and employees in the civil service system administered by the Personnel Board. The Personnel Board has agreed to review its testing and other selection procedures to insure that they do not unlawfully discriminate against either blacks or women.

To correct for the effects of any alleged past discrimination against blacks by the Personnel Board, the Consent Decree provides for interim annual certification goals in nineteen (19) classified service positions. These goals range from 33% to 50%. The jobs to which these certification goals apply are:

1. Accountant
2. Account Clerk
3. Animal Control Officer
4. Auditor
5. Automotive Mechanic
6. Construction Equipment Operator
7. Engineering Aide
8. Heavy Equipment Operator
9. Intermediate Clerk
10. Labor Supervisor
11. Public Works Supervisor (including Construction Supervisor and Landfill Supervisor)
12. Refuse Truck Driver
13. Revenue Examiner
14. Secretary
15. Senior Clerk
16. Stenographer
17. Truck Driver
18. Waste Water Treatment Plant Operator
19. Zookeeper

The Consent Decree also incorporates a prior Order of the District Court entered on January 10, 1977 concerning the certification of blacks for police officer, deputy sheriff and firefighter positions. That Order requires, among other things, that the number of blacks certified for these jobs approximate the number of black applicants for those positions.

To correct for the effects of any alleged past discrimination against women by the Personnel Board, the Consent Decree provides for annual certification goals for women in fourteen (14) classified service jobs. The goals range from 10% to 25%. The jobs to which these certification goals apply are:

1. Drafter
2. Engineering Aide
3. Engineering Drafter
4. Engineering Technician
5. Firefighter
6. Graduate Engineer
7. Police Officer/Deputy Sheriff
8. Police Radio Dispatcher*
9. Radio Dispatcher*
10. Revenue Examiner
11. Security Officer
12. Sr. Civil Engineer
13. Stores Clerk
14. Traffic Planning Technician

*Goals apply only to certifications to Fultondale, Gardendale, Midfield, Mountain Brook, and Tarrant.

All of the annual certification goals are subject to the availability of qualified black and female applicants, and they do not preclude the certification of qualified males and non-minorities. These goals are also temporary or interim measures because they are designed to end when certain minimum employment levels are reached. These levels are defined in terms of the percentage of blacks and women in the civilian labor force of Jefferson County.

The Consent Decree also provides for a lowering of the time in grade requirements prescribed by the Board for promotions in certain sworn police and fire department positions, such as police sergeant and fire lieutenant; the elimination of minimum height and weight requirements in all classified service jobs, including police officer and firefighter; and the elimination of promotional potential ratings in certain departments of the City of Birmingham and Jefferson County where such ratings had an adverse impact on blacks. Those departments are: City of Birmingham – Streets and Sanitation,

Police, Fire, and Parks and Recreation; Jefferson County – Cooper Green Hospital, General Services.

Promotional eligibility requirements in certain public works and streets and sanitation positions have been revised to expand the pool of employees eligible for promotional consideration. For example, if this Consent Decree is finally approved by the Court, employees in unclassified laborer and semi-skilled laborer positions would be eligible to take promotional examinations for jobs such as refuse truck driver and heavy equipment operator. In the past, employees in these jobs were not eligible to take these promotional examinations.

The Consent Decree provides for $35,000.00 in back pay for a class of blacks who took the Personnel Board's written tests for police officer positions which resulted in eligibility lists in effect between April 25, 1975, and January 10, 1977 or who took the tests for firefighter positions which resulted in eligibility lists in effect between July 8, 1976 and January 10, 1977. Back pay for individual class members will be contingent on the filing of timely proof of claim forms with the Clerk of the Court.

The Decree also provides for the priority certification of nineteen (19) named black individuals to various jobs in the Streets and Sanitation Department of the City of Birmingham. These jobs include public works supervisor, labor supervisor, construction equipment operator and refuse truck driver.

IV.

General Summary of the Consent Decree With The City of Birmingham

The Consent Decree contains injunctive provisions which are designed to insure equal employment opportunities with the City for all persons without regard to race or sex in hiring, promotion, training, job assignments, discharge, and other terms and conditions of employment.

To correct for the effects of any alleged past discrimination against blacks and women, the Decree contains interim annual hiring and promotion goals for blacks and women. The goals are subject to the availability of qualified black and female applicants, and they do not preclude the hiring or promotion of qualified males and nonminorities. The goals are temporary or interim measures because they are designed to end when the percentage of blacks and women in the affected jobs or groups of jobs approximate the percentage of blacks and women in the labor force of Jefferson County.

The City has agreed to interim annual hiring and promotion goals for blacks in the following specific job categories:

1. Account Clerk
2. Automotive Mechanic
3. Building Inspector
4. Construction Equipment Operator
5. Firefighter
6. Gardener
7. Heavy Equipment Operator
8. Labor Supervisor
9. Police Officer
10. Police Radio Dispatcher
11. Police Sergeant
12. Fire Lieutenant
13. Public Works Supervisor
14. Construction Supervisor
15. Refuse Truck Driver
16. Revenue Examiner
17. Secretary
18. Senior Clerk
19. Senior Sanitation Inspector
20. Zookeeper

The Consent Decree also provides for annual employment goals for blacks in certain groups of jobs in the following departments: Engineering, Finance, Inspection Services, Traffic Engineering, and Housing.

The Consent Decree provides for annual hiring and promotional goals for women in police officer and police sergeant positions, and in groups of jobs in the following departments: Fire, Engineering, Inspection Services, Municipal Garage, Housing, Streets and Sanitation, Traffic Engineering, Parks and Recreation and Parking Authority.

The City has agreed to lower the time in grade requirement for promotions in several sworn positions in the Police and Fire Departments such as police sergeant and fire lieutenant, and it has agreed to expand the pool

of employees eligible to apply for promotions to jobs in the Streets and Sanitation Department. The City has also agreed to discontinue the use of promotional potential ratings in the Police, Fire, Streets and Sanitation, and Park and Recreation Departments.

The Consent Decree provides for $30,000.00 in back pay for six (6) of the named plaintiffs in the *Martin* action, and for $235,000.00 in back pay for four subclasses of blacks and a subclass of women. These subclasses consist of: (1) blacks who took the police officer tests for the City of Birmingham which resulted in eligibility lists in effect between April 25, 1975, and January 10, 1977, and the firefighter tests for the City of Birmingham which resulted in eligibility lists in effect between July 8, 1976, and January 10, 1977; (2) blacks in unclassified laborer positions with the City who between March 24, 1972 and May 19, 1981 were reclassified into the classified service; (3) blacks who between March 24, 1972 and May 19, 1981, were denied promotional opportunities in the Streets and Sanitation department of the City; (4) women employed as traffic citation officers or policewomen who, between March 24, 1972, and May 27, 1975 were assigned to the Youth Aid Division of the City Police department; and (5) blacks who were certified but not hired for certain positions in the Police and Finance departments of the City between March 24, 1972, and January 7, 1974.

The back pay amounts set aside for each of the subclasses identified above are: Class 1 ($5,000.00), Class 2 ($65,000.00), Class 3 ($137,000.00), Class 4 ($6,000.00), Class 5 ($22,000.00).

Procedures for allocating the amounts of back pay among members of each of the subclasses are set out in Appendix D to the Consent Decree with the City of Birmingham. Each subclass member will be required, after final approval of the Consent Decree, to file a proof of claim form in order to be eligible for an award of back pay.

The Consent Decree provides for priority hiring and/or promotions and remedial seniority for several of the named plaintiffs in the *Martin* case, and for nineteen (19) named members of subclass 3 in the Streets and Sanitation department of the City of Birmingham. Certain other members of each of the five subclasses may be eligible for priority hiring or promotional opportunities and remedial seniority based upon the individual facts of their claims. Their relief is to be determined after they submit the appropriate proof of claim forms.

V.

Attorneys' Fees and Costs

Neither of the Consent Decrees contains an award of attorney fees or costs for counsel for the plaintiffs. The amount of attorneys' fees and costs as finally determined will NOT REDUCE the amounts to be distributed as back pay to any of the subclass members or named plaintiffs under either of the Consent Decrees.

If you have any questions with respect to this notice, the Consent Decree, or the procedures for filing your proof of claim form, you may call or write any of the attorneys listed below:

Attorneys for the United States:

Richard J. Ritter
United States Department
of Justice
Civil Rights Division
Federal Enforcement Section
Room 4517
Washington, DC 20530
(202) 633-4086

Caryl Privett
Assistant United States Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, Alabama 35203
(205) 254-1785

Attorneys for the Plaintiffs in Martin, et al. v. the City of Birmingham:

Stephen L. Spitz
Lawyers Committee for
Civil Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, DC 20005
(202) 628-6700

Susan Reeves
Reeves & Still
2027 First Avenue North
Suite 400
Birmingham, AL 35203
(205) 322-7479

Attorney for the Plaintiffs in NAACP v. Seibels:

Oscar William Adams, III
1600 2121 Building
Birmingham, AL 35203
(205) 324-4445

APPENDIX G

Notice To [Subclass definition]:

This announcement is to inform you of your right to present a claim for individual relief under a Consent Decree between the plaintiffs and the City of Birmingham in the consolidated actions of: *Ensley Branch of the N.A.A.C.P. et al. v City of Birmingham, et al.*, C.A. No. 74-Z-12-S; *John W. Martin, et al. v. City of Birmingham*, C.A. No. 74-Z-17-S; and *United States of America v. Jefferson County, et al.*, C.A. No. 75-P-0666-S.

If you are a member of the subclass described in the caption of this notice you may fill out the attached proof of claim form and mail it to the Clerk of the Court for Northern District of Alabama. Enclosed for your use is an unstamped envelope containing the mailing address of the Clerk of the Court.

If you wish to present a claim for individual relief under the Consent Decree, your proof of claim form must be received by the Clerk of the Court by no later than ___ p.m. on ___, 1981. If you do not file this proof of claim form with the Clerk of the Court by that date then, absent good cause shown, you will be deemed to have waived your right to present a claim for individual relief under the Consent Decree.

After your proof of claim form is filed, you will be contacted by attorneys for the plaintiffs. They will review with you your proof of claim form and the relevant facts which support your claim. Thereafter, these attorneys will make a recommendation to the Court whether your claim merits an award of individual relief under the Consent Decree. Such an award may include a job offer or promotion with the City, remedial seniority and/or back pay. The City has reserved the right to review and to object to any individual job offers and/or remedial seniority dates proposed by counsel for the plaintiffs on your behalf which have not been previously agreed upon by the parties under the Consent Decree. The City has agreed not to contest any of the individual back pay determinations. If any objections are raised by the City to any proposed job offers and/or remedial seniority for you, and if the parties are unable to resolve such objections, then the Court will determine the appropriate relief, if any, for you under this Consent Decree.

After final determinations have been made of the individual awards of relief to be made under this Consent Decree, you will be notified of your individual award, if any. If you do not receive an award of individual relief under the Consent Decree, or if you are not satisfied with the amount of relief provided to you, you will have the right to file an objection to the resolution of your claim with the Clerk of the Court. That objection will be subsequently ruled upon by the District Court. The procedures for filing any such objections will be explained to you in the notice you will receive informing you of your award of relief, if any.

If you have any questions with respect to this notice, the Consent Decree, or the procedures for filing your proof of claim form, you may call or write any of the attorneys listed below:

Attorneys for the United States:

Richard J. Ritter
United States Department
of Justice
Civil Rights Division
Washington, DC 20530
(202) 633-4086

Caryl Privett
Assistant United States Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, Alabama 35203
(205) 254-1785

Attorneys for the Plaintiffs in Martin, et al. v. the City of Birmingham:

Stephen L. Spitz
Lawyers Committee for
Civil Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, DC 20005
(202) 628-6700

Susan Reeves
Reeves & Still
2027 First Avenue North
Suite 400
Birmingham, AL 35203
(205) 322-7479

APPENDIX H

Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the appropriate box or boxes if you fall within either or both of the classes described below. If you check either of the boxes, please complete this proof of claim form by supplying the information requested below.

[ ] I am a black person who took a written test administered by the Personnel Board of Jefferson County for a job as a police officer with the City of Birmingham. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

[ ] I am a black person who took a written test administered by the Personnel Board of Jefferson County for a job as a firefighter with the City of Birmingham. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

If you check either of the boxes above, please indicate in the space provided below whether you were ever contacted by the City of Birmingham for employment as a police officer or firefighter, and the approximate date(s) of such contact to the best of your recollection. Also, please indicate whether you were ever offered employment with the City as a police officer or firefighter, and

the date you began employment with the City if you accepted such a job offer.

_____

_____

_____

_____

_____

_____

_____

_____

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

_____
Signature

Date: _____

_____

APPENDIX I

Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the box provided below if the statement next to the box applies to you and you wish to present a

claim for relief under the Consent Decree with the City of Birmingham.

[ ] I am a black person who worked for the City of Birmingham as an unclassified laborer on or after March 24, 1972 and who was later brought into the classified service on _____ (fill in approximate date) as a _____ (fill in job title). I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

_____
Signature

Date: _____

APPENDIX J

Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the box provided below if the statement next to the box applies to you. If you check the box, please complete the proof of claim form by supplying the information requested below.

[ ] I am a black person who was employed by the City of Birmingham in the Streets and Sanitation Department on or after March 24, 1972 in either a classified or unclassified position, and I was denied the opportunity to apply for a promotion to a higher paying position in the Streets and Sanitation Department after that date. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

I.

Please supply the following additional information:

Please list the job(s) which you claim you were denied promotional opportunities in:

_____

_____

_____

[*Please note:* You may list a job(s) in the space provided above even if you were not eligible to apply for it under the promotion policies of the City of Birmingham or the Personnel Board of Jefferson County.]

2. How long have you been employed in the Streets and Sanitation Department of the City of Birmingham? (Include classified and unclassified service time) _____

3. List the approximate date when you were first hired by the City. (If you were first hired as an unclassified laborer please list that date) _____

4. Please list all of the job [sic] in which you have worked on a permanent full time basis in the Streets and

Sanitation Department of the City and the approximate dates you worked in those jobs.

_____

_____

_____

_____

_____

_____

5a. Have you ever taken a written promotional examination for the job of Heavy Equipment Operator in the Streets and Sanitation Department of the City? Yes ____ No ___

b. If you answer to a is yes please indicate the date(s) you took the examination. _____

c. Please indicate whether at any time prior to January 1, 1979 you ever received a promotion to a permanent full time position as a Heavy Equipment Operator in the Streets and Sanitation Department of the City. Yes ____ No ____

6. Have you ever expressed an interest to any official of the City of Birmingham or the Personnel Board of Jefferson County about being promoted to any of the jobs you have listed in your answer to 1 above? If so, please supply the following information in the space provided below: (1) the approximate date(s) that you expressed such an interest, (2) the person to whom such interest was expressed, (3) the job you were in at the time you expressed your interest, and (4) indicate whether you

were ever offered such a promotion by the City or the Personnel Board.

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

Signature

Date: _____

APPENDIX K

Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the box immediately below if the statement next to the box applies to you. If you check the box, please complete the proof of claim form by supplying the information requested below.

[ ] I am a female who prior to May 27, 1975, was hired by the City of Birmingham as a traffic citation officer or policewoman and who, on or after March 24, 1972, was assigned to the Youth Aid Division of the City Police Department. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

If you were originally hired as a traffic citation officer and were subsequently promoted or reclassified to a position as a policewoman, please indicate whether you were credited with your seniority as a traffic citation officer at the time you became a policewoman.

_____

_____

_____

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

_____

Signature

Date: _____

APPENDIX L

Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the appropriate box or boxes if you fall within any of the classes described below. If you check any of the boxes, please complete the proof of claim form by supplying the information requested below.

[ ] I am a black person who applied for a job as a police officer with the City of Birmingham between March 24, 1972 and January 7, 1974, and I was not hired or offered employment by the City in that job. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

[ ] I am a black person who applied for a job as a keypunch operator with the City of Birmingham between March 24, 1972 and January 7, 1974, and I was not hired or offered employment by the City in that job. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

[ ] I am a black person who applied for a job as a clerk typist with the City of Birmingham between March 24, 1972, and January 7, 1974, and I was not hired or offered employment by the City in that job. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

[ ] I am a black person who applied for a position as an intermediate clerk with the City of Birmingham between March 24, 1972, and January 7, 1974, and I was not hired or offered employment by the City in that job. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

If you have checked any of the boxes above, please indicate in the space provided below whether to the best of your recollection you were ever contacted by the City of Birmingham for an interview for the job or jobs you have checked, whether you appeared for that interview, and, if so, what happened during that interview. If you need more space to supply this information you may attach additional sheets of paper to this this proof of claim form.

_____

_____

_____

_____

_____

_____

_____

_____

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

_____

Signature

Date: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JEFFERSON COUNTY, et al., Defendants.	CIVIL ACTION NO. 75-P-0666-S
JOHN W. MARTIN, et al., Plaintiffs, v. CITY OF BIRMINGHAM, et al., Defendants.	CIVIL ACTION NO. 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., et al., Plaintiffs, v. GEORGE SEIBELS, et al., Defendants.	CIVIL ACTION NO. 74-Z-12-S

CONSENT DECREE WITH THE JEFFERSON COUNTY PERSONNEL BOARD

These consolidated actions were brought by the United States and certain private plaintiffs against the Jefferson County Personnel Board, and other defendants not included within the terms of this Decree, to enforce the provisions of Title VII of the Civil Rights Act of 1964,

as amended, 42 U.S.C. 2000e, *et seq.*, the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. 1221, *et seq.*, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §3766(c)(1), the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981 and §1983, and the Fourteenth Amendment to the Constitution of the United States. In their Complaints, the plaintiffs allege, *inter alia*, that the Jefferson County Personnel Board (hereinafter the "Personnel Board" or "Board"), in carrying out its employee selection functions for Jefferson County and other jurisdictions within Jefferson County, has engaged in a pattern or practice of discrimination based on race and sex.

The Personnel Board denies it has engaged in any pattern or practice of discrimination or other types of discrimination on the basis of race or sex in carrying out its employee selection functions. However, the Board realizes that certain facts concerning past practices of the Personnel Board might have given rise to an inference that such a pattern or practice existed, and that this Court entered a Decision and Order in these consolidated actions on January 10, 1977, concerning Personnel Board testing practices for entry level police, deputy sheriff and fire positions, 14 FEP Cases 670, *aff'd in part, reversed in part and remanded*, 616 F.2d 812 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3443 (Dec. 15, 1980). For the purposes of avoiding further litigation, and in resolution of the dispute over the claims of discrimination against the Personnel Board, the United States, the plaintiffs who are signatories to this Decree, and the Personnel Board are now willing to agree to the entry of this Consent Decree.

The plaintiffs and the defendant Jefferson County Personnel Board wish to avoid the delay and expense of further litigation and to insure that any alleged disadvantages to blacks and women that may have resulted from any alleged past discrimination against them in their obtaining employment and advancement are remedied so that equal employment opportunities will be provided to all. The plaintiffs who are signatories to this Decree and the Personnel Board, by agreeing to the issuance of this Decree, waive any findings of fact and conclusions of law on all outstanding issues pertaining solely to the Personnel Board's liability in these consolidated actions, except for costs and attorneys fees. The Personnel Board agrees to negotiate with the plaintiffs in the *Martin* case regarding the amount of attorneys' fees and costs to plaintiffs in the *Martin* case and will negotiate with plaintiffs regarding the amount of such fee. If the parties are unable to reach agreement on the amount of such fees and costs, the Court will resolve the dispute. The United States waives its right to recover costs against the Personnel Board.

By entering into this Decree the plaintiffs do not waive their rights to have this Court determine the liability and remedial obligations, *vel non*, of any other defendant based upon such defendant's use of Personnel Board recruitment and selection practices or any other employment practices which have been or remain the subject of litigation in these actions. This Decree shall not however constitute an adjudication or admission by the Personnel Board of any violation of law or findings on the merits, of these cases.

Now therefore, on the basis of the foregoing representation of the United States, and counsel for the other plaintiffs who are signatories to this Decree and the Personnel Board, and all trial proceedings and discovery filed herein to date, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. GENERAL PROVISIONS

1. The defendant Jefferson County Personnel Board and its officers, agents, employees, successors and all persons acting in concert with them or any of them in the performance of their official functions are subject to the terms of this Consent Decree and shall refrain from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with, those jurisdictions served by the Personnel Board because of such individual's race or sex. The defendant Jefferson County Personnel Board and its officers, agents, employees, successors and all persons acting in concert with them or any of them in the performance of their official functions shall not discriminate against any employee or applicant for employment in certifying for hire or promotion, in upgrading, training, assignment or discharge, or with respect to compensation, terms and conditions or privileges of employment, because of such individual's race or sex.

2. Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory within the meaning of paragraph 1 above

or the provisions of 42 U.S.C. 2000e-2(h), (j), and the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by intervention or collateral attack. If any collateral lawsuit involving this Consent Decree arises in state court, then the Personnel Board shall notify counsel for the plaintiffs and remove such action to the United States District Court.

II. TESTING AND OTHER SELECTION PROCEDURES

A. In General

3. All phases of the Personnel Board's testing and other selection and certification procedures for both hires and promotions shall continue to be reviewed periodically by the Board to assure that such procedures comply with the standards and requirements of the *Uniform Guidelines on Employee Selection Procedures*, 43 F.R. 38250 (August 25, 1978) (hereinafter "*Uniform Guidelines*"). More specifically, the Personnel Board shall utilize qualifications, tests or other selection standards or procedures which the Board can demonstrate either have no adverse impact or have been validated in accordance with the *Uniform Guidelines*. In this regard, the Personnel Board shall continue to apply statistical tests to, and otherwise conduct analysis of, the various data generated in the course of using or assessing the validity of any such qualifications, tests or other selection standards or procedures for the purpose of making a good faith effort to determine whether there are any alternative measures including revisions in scoring and ranking procedures which may be followed which will reduce or eliminate

any adverse impact on blacks or women and which would continue to provide a sufficient pool of qualified candidates for certification and selection in accordance with the goals of this Decree.

B. Written Tests In Specific Jobs

4. The Board may continue to administer its current written tests for the jobs of Account Clerk, Accountant, Auditor, Intermediate Clerk, Revenue Examiner, Secretary, Senior Clerk, Stenographer, Police Sergeant and Sheriff's Sergeant for the certification of candidates for those jobs, provided that such certifications are in conformity with the interim certification goals for any such jobs for which a certification goal is established by paragraph 24 of this Decree.

5. The Personnel Board shall no longer administer any of the written tests which were challenged by the plaintiffs in these actions to establish eligibility lists for any of the following jobs:

1. Animal Control Officer
2. Zoo Keeper
3. Automotive Mechanic
4. Engineering Aide
5. Heavy Equipment Operator
6. Waste Water Treatment Plant Operator
7. Construction Equipment Operator

The Personnel Board may continue to use any eligibility lists based in whole or in part upon the scores applicants received on any of the challenged written tests for the jobs identified above if such lists remain in effect on the date this Decree is approved and entered by the Court. However, any certifications from such eligibility lists

shall be in conformity with the interim certification goals set forth in paragraph 24 below.

6. Any qualifications, tests or other selection standards or procedures used for the establishment of new eligibility lists and/or certifications in the jobs listed in paragraph 5 shall be designed so as to eliminate or reduce any adverse impact in certifications against blacks, and shall be consistent with the standards and requirements of the Uniform Guidelines as specified in paragraph 3. Certifications from such new eligibility lists shall be consistent with the goals for the certification of blacks as set forth in paragraph 24 below.

7. The Personnel Board may continue to administer the 20-B firefighter test and the 10-C police officer test provided that certifications are in compliance with this Court's Order of January 10, 1977, which is incorporated herein as part of this Consent Decree. The plaintiffs reserve the right to petition the Court for supplemental relief under that Order as incorporated herein in the event that the percentage of black applicants for police officer/deputy sheriff positions falls below 35% and the percentage of black applicants for firefighter positions falls below 25%.

C. High School Education Requirements

8. The Personnel Board shall no longer require that applicants for the jobs listed below posses a high school diploma (or G.E.D. equivalent) in order to be eligible to be considered for employment in those positions, unless the Personnel Board can demonstrate in accordance with the provisions of paragraph 3 of this Decree that such

selection criteria comply with the requirements of the *Uniform Guidelines.*

1. Zoo Keeper
2. Engineering Aide
3. Firefighter
4. Power Distribution Helper
5. Police Radio Dispatcher/Radio Dispatcher
6. Waste Water Treatment Plant Operator

D. Promotional Potential Ratings

9. The Personnel Board may continue the use of its current promotional potential rating system in departments where it is shown to have no adverse impact. The Board shall discontinue the use of its current promotional potential rating system in the following departments of the following jurisdictions where such ratings have been demonstrated to have had an adverse impact on blacks.

Jurisdiction	Department
City of Birmingham	Streets & Sanitation
City of Birmingham	Police
City of Birmingham	Fire
City of Birmingham	Parks & Recreation
Jefferson County	Cooper Green Hospital
Jefferson County	General Services

10. The Personnel Board further agrees to discontinue the use of its current promotional potential rating system to determine eligibility for promotion in any other department where based upon any two successive rating cycles (one cycle consisting of 6 months) there is evidence of adverse impact against blacks. In determining adverse impact under this subpart the parties agree to rely upon section 4D of the *Uniform Guidelines.*

11. If the Personnel Board seeks to institute any new promotional potential rating system, it shall first be instituted on an experimental basis in a department or departments selected by the Personnel Board. As soon as data becomes available, the Personnel Board shall serve upon counsel for the plaintiffs a report reflecting the impact of the system on blacks. This report shall be submitted in conformity with the reporting requirements of paragraph 50 below.

If such report disclosed that this new rating system has no adverse impact on blacks, then the Personnel Board shall, as soon as practicable, serve upon counsel for the plaintiffs a copy of any studies and support data bearing upon the validity of this system under the *Uniform Guidelines*. Compliance with the requirements of this paragraph shall not relieve the Personnel Board or a defendant jurisdiction from any liability under Title VII and this Decree which may result from the interim or permanent use of a new rating system which has an adverse impact on blacks.

12. Should any of the plaintiffs have objection to any such promotional potential rating system, they may file such objection with the Court within 60 days of their receipt of the documents identified in paragraph 11 above, or within 60 days of their receipt of copies of the ratings for the first two rating cycles. If such an objection is filed, the Personnel Board shall not utilize or shall cease utilizing any such promotional potential rating system unless and until approved by the Court.

E. Time In Grade Requirements For Promotions In Police, Sheriff and Fire Department Positions

13(a). The Personnel Board shall not require police officers and deputy sheriffs to serve more than three years uninterrupted service in rank (or two years uninterrupted service in the rank for candidates who have two years of college credits) in order to be eligible to take the promotional examination for police sergeant or sheriff's sergeant, nor shall it require police sergeants and deputy sheriff sergeants to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for police lieutenant or sheriff's lieuTenant [sic]. Employees who have obtained permanent status as police lieutenant or sheriff's lieutenant shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank. The Personnel Board agrees that it shall not announce a new promotional examination for police sergeant or sheriff's sergeant for the City of Birmingham or Jefferson County for a period of at least one year following the entry of this Decree.

13(b). The Personnel Board shall not require firefighters to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for the position of fire lieutenant. Employees who have obtained permanent status as fire lieutenant or fire captain shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank.

13(c). For purposes of subparagraphs (a) and (b) the term "uninterrupted service" shall include any time spent as a probationary employee.

F. Height-Weight Requirements

14. The Personnel Board previously discontinued the use of minimum height and weight requirements as selection criteria for any classified service position. The Personnel Board may continue to administer its class A, class B and class C physical standards for classified service positions provided that no minimum height or minimum weight requirements are followed.

G. Eligibility To Apply For Promotions To Certain Jobs

15. The Personnel Board may prescribe that in combination with or in lieu of taking a promotional examination for the positions of Public Works Supervisor, Sanitation Inspector or Construction Supervisor that applicants for such positions be required successfully to complete a job related training program of no more than 12 weeks duration for that job. This program may be extended for individuals who fail successfully to complete such training within the prescribed time. Such program is to be under the direct supervision of the Personnel Board as to design, content, and related logistics. If any tests are used and administered as part of such program they shall be designed and administered in accordance with the provisions of paragraph 3 above. The Personnel Board may utilize the resources of any of the

separate jurisdictions so affected in the preparation and conduct of such training program. The Personnel Board may also institute training programs for classified or unclassified employees in other positions identified in paragraphs 16 through 20 below, provided such training programs are established and implemented in accordance with the provisions of this paragraph. Eligibility for any training programs established by the Board under this paragraph shall be open to all employees in the lower rated classifications as specified by paragraphs 16 through 20 below. Candidates for such training who are employed in the classified or unclassified service shall not be required to incur any reduction in their hourly or salaried wage rates or any loss of seniority in order to receive such training. Any training programs established by the Personnel Board under this paragraph shall not be used or maintained so as to interfere with the Board's ability to meet the certification goals set forth in paragraph 24.

16. In order to apply to take a promotional examination in the jurisdiction where employed for the position of Public Works Supervisor or Construction Supervisor, each applicant must have permanent status in one of the following classifications: Truck Driver, Refuse Truck Driver, Labor Supervisor, Heavy Equipment Operator, or Construction Equipment Operator. To apply to take the promotional examination for the position of Sanitation Inspector, an employee must have permanent status as a Truck Driver or Semi-skilled laborer.

17. If the Personnel Board establishes a classification of Refuse Collection Supervisor, then promotional eligibility shall be limited to employees with permanent

status as Truck Driver and Refuse Truck Driver. Certifications to such classifications shall be in accordance with the goal for Public Works Supervisor as set forth in paragraph 24. The pay grade and steps within grade for that classification shall be set and maintained at no less than the pay grade and steps within grade for the classification of Public Works Supervisor. The Personnel Board may, if justified by future pay plan audits, raise the Refuse collection Supervisor classification to a pay grade higher than that of Public Works Supervisor. If a Refuse Collection Supervisor position is established in the City of Birmingham, the number of Refuse Collection Supervisors shall be at least two fifths (2/5ths) of the total number of Public Works Supervisor positions in the City of Birmingham.

18. The Personnel Board shall permit any employee who has worked full-time in an unclassified laborer position for twelve consecutive months to apply to take a promotional examination in the jurisdiction where employed for the following classifications: Semi-skilled Laborer, Truck Driver, Refuse Truck Driver, Equipment Service Worker, Automotive Mechanic Helper. As used in this paragraph, the term laborer shall include the classifications of Building Service Worker, Laborer and Refuse Collector.

19. The Personnel Board shall permit any employee who has obtained permanent status as a Semi-skilled Laborer or Truck Driver to apply to take a promotional examination in the jurisdiction where employed for the following classifications: Truck Driver, Refuse Truck Driver, Labor Supervisor, Heavy Equipment Operator, Equipment Service Worker, Automotive Mechanic Helper.

20a. The Personnel Board shall permit any employee who has obtained permanent status as a Heavy Equipment Operator, Refuse Truck Driver, or Labor Supervisor to apply to take a promotional examination in the jurisdiction where employed for the classification of Construction Equipment Operator. In addition, employees of the City of Birmingham who have obtained permanent status as truck drivers shall also be permitted to apply to take the promotional examination for Construction Equipment Operator in Birmingham.

20b. The Personnel Board agrees that it shall not certify any candidates for permanent, full time positions with the City of Birmingham until after this Court grants final approval to this Consent Decree in any of the following positions: Public Works Supervisor, Construction Supervisor, Construction Equipment Operator, Labor Supervisor, Heavy Equipment Operator, or Refuse Truck Driver.

21. Attached as Appendix A to this Decree is a list of incumbent employees of the Streets and Sanitation Department of the City of Birmingham. Immediately upon final approval of this Consent Decree by the Court, those individuals shall be certified for promotion to the first vacancy in the Streets and Sanitation Department in a permanent, full time position in the job listed next to their names. Such individuals shall not be required to take any further promotional examinations or training in order to be certified for promotion under this paragraph. As future vacancies arise in such jobs, the Board shall continue to certify these individuals for promotion until each such individual is promoted to such jobs, or declines

an offer of promotion to such job. If any individual identified in Appendix A declines an offer of promotion by the City of Birmingham to the job listed next to his name, the Personnel Board shall be under no further obligation to consider that individual as eligible for priority certification for promotion under the terms of this paragraph. However, this shall not preclude or in any way adversely affect the right of any such person to apply for future promotional opportunities in a classified service position under the Personnel Board's normal promotion procedures as modified by this Consent Decree.

III. SEX RESTRICTIONS IN JOB ANNOUNCEMENTS AND CERTIFICATES

22. The Personnel Board shall not restrict any job announcements or certifications on the basis of sex except that the Board may continue to certify males to supervise male juvenile offenders at the Jefferson County Detention Home. The Personnel Board may establish a special medical examination to be given to applicants for nurses aide and laundry worker positions. Such examination shall be used solely to determine whether applicants for such positions are physically qualified to perform the duties of those jobs, and it shall not be used to discriminate in purpose or effect against female applicants.

IV. GOALS FOR BLACKS AND WOMEN

23. The parties to this Consent Decree recognize that the decision to employ persons certified by the Personnel Board is left to the sole discretion of the appointing authority of each jurisdiction. For this reason, the Personnel Board agrees that it will continue to certify blacks and women in accordance with the goals of this Consent Decree to each of the jurisdictions currently served by the Personnel Board until such time as the employment of blacks in the jobs identified in paragraph 24 and of women in the jobs identified in paragraph 25 in each jurisdiction approximates the respective percentages in the civilian labor force of Jefferson County as reflected by the 1970 Federal Census. The parties agree to recognize any changes in those percentages which may come about as a result of the final publication of the 1980 Census.

24. Subject to the availability of qualified black applicants, the Personnel Board shall establish and attempt to meet an annual goal of certifying to each of the jurisdictions currently served by the Board black applicants at the rates set forth below or at the rate of black representation among applicants who meet job related requirements to apply for such jobs, whichever is higher. The parties preserve the right to adjust, by agreement, any of goals where it can be shown that a professional degree, license or certificate is required to perform the duties of any of the jobs referred to in this paragraph, and that these annual certification goals do not reasonably reflect the percentage of qualified blacks in the relevant labor market who possess such degrees, licenses or certificates.

Job Classification	Certification Goal
1. Accountant	33%
2. Account Clerk	33%
3. Animal Control Officer	33%
4. Auditor	33%
5. Automotive Mechanic	33%
6. Construction Equipment Operator	50%
7. Engineering Aide	33%
8. Heavy Equipment Operator	50%
9. Intermediate Clerk	33%
10. Labor Supervisor	50%
11. Public Works Supervisor (including Construction Supervisor and Landfill Supervisor)	50%
12. Refuse Truck Driver	50%
13. Revenue Examiner	50%
14. Secretary	33%
15. Senior Clerk	33%
16. Stenographer	33%
17. Truck Driver	50%
18. Waste Water Treatment Plant Operator	33%
19. Zoo Keeper	33%

With regard to certifications to the jobs of Police Sergeant and Sheriff's Sergeant the Personnel Board agrees to certify sufficient numbers of qualified blacks to meet any promotion goals for this job established by a Consent Decree or litigated Decree between the United States and/or any other plaintiff and any other defendant in these consolidated actions in accordance with the provisions of paragraph 34 below.

25. Subject to the availability of qualified female applicants, the Personnel Board shall establish and attempt to meet an annual goal of certifying to each of the jurisdictions currently served by the Board qualified female applicants at the rates set forth below or at the rate of female representation among applicants who meet the job related requirements to apply for such jobs, whichever is higher. The parties preserve the right to adjust, by agreement, any of those goals where it can be shown that a professional degree, license, or certificate is required to perform the duties of any of the jobs referred to in this paragraph.

Job Classification	Certification Goal
Drafter	15%
Engineering Aide	15%
Engineering Drafter	15%
Engineering Technician	15%
Firefighter	10%
Graduate Engineer	10%
Police Officer/Deputy Sheriff	25%
Police Radio Dispatcher*	20%
Radio Dispatcher*	20%
Revenue Examiner	20%
Security Officer	25%
Sr. Civil Engineer	10%
Stores Clerk	20%
Traffic Planning Technician	10%

* Certification goal only applies to those jurisdictions where this job has been previously restricted to males only. Those jurisdictions are: Fultondale, Gardendale, Midfield, Mountain Brook and Tarrant.

26. In filling any vacancies covered by paragraphs 24 and 25 above, the appointment of a black female shall

count toward both black and female interim certification goals.

27. The parties recognize that the certification goal set by this Decree for female firefighters may not accurately reflect the availability of female applicants for this job assuming full compliance with the affirmative recruitment obligations set forth in paragraph 29 below. Accordingly, two years after the date of entry of this Decree the parties shall review the efforts of the Personnel Board to recruit female firefighters (as well as any such recruitment efforts conducted by any of the jurisdictions served by the Board), together with female applicant flow data for that job in order to determine whether the female certification goal should be raised or lowered to more accurately reflect the availability of females for this job.

28. The parties further agree to consider the establishment of an interim certification goal for females in the jobs listed below two years following the date of entry of this Decree. At that time, if recruitment efforts and/or applicant flow data support it, the parties shall negotiate appropriate interim certification goals for women in any or all of such jobs.

1. Building Inspector
2. Carpenter
3. Electrical Inspector
4. Electrician
5. Gas Inspector
6. Mains Service Worker
7. Maintenance Repair Worker
8. Painter
9. Power Distribution Helper
10. Plumber
11. Plumbing Inspector

12. Refrigeration & Heating Mechanic
13. Semi-Skilled Laborer
14. Voting Machine Mechanic
15. Waste Water Treatment Plant Operator
16. Waste Water Treatment Plant Worker

V. RECRUITMENT

29. The Personnel Board shall continue to operate a comprehensive recruitment program designed to meet the needs of the service and specific requirements set out in this Consent Decree. To meet these purposes, the Personnel Board, in addition to its own resources, shall have access to and utilize what other resources may be deemed appropriate and available from each and every jurisdiction and department thereof comprising the merit system subject to the Civil Service Act and terms of this Decree.

30. The Personnel Board will continue to engage in affirmative recruitment activities which are consistent with it obligation to take all reasonable steps to reach the goals set forth in this Decree, and will insure that the Personnel Board's policy of affirmative recruitment and non-discrimination in hiring is emphasized to blacks and women. Wherever feasible, the Board shall utilize newspaper, radio and other media of mass circulation in an effort to attract qualified applicants. The Board shall maintain regular contact with area high schools, technical and vocational schools, the Alabama Department of Employment Security and minority and women's organizations such as the Urban League and the NAACP. The Board shall continue to notify such schools and organizations of anticipated job vacancies in the classified service

and shall send to them examination announcements sufficiently in advance of any scheduled examination to provide such schools and organizations a reasonable opportunity to refer qualified minority and female applicants. Such announcements shall continue to specify that the Personnel Board is an equal opportunity employer.

31. The Personnel Board shall continue to insure that promotional examination announcements and announcements of training opportunities are issued and posted in conspicuous places within each jurisdiction and department reasonably in advance of any scheduled promotional examination or training opportunities in order to provide incumbents with a fair opportunity to apply for promotion or training and to adequately prepare for the promotional examination or training. In this regard, the Personnel Board shall insure that all persons eligible for training programs and promotional examinations have equal access to all books, articles, pamphlets, and other materials which are used for preparation for such examinations or training, and that these materials are made available to such persons reasonably in advance of any scheduled promotional examinations or training.

VI. THE UNCLASSIFIED SERVICE

32. Effective September 1, 1981, the Personnel Board shall recommend to the appropriate jurisdictions that all unclassified laborer positions with the exception of seasonal or temporary manual labor positions be brought into the classified service with all attendant rights, benefits, wages, and privileges presently accorded to classified employees. The Personnel Board will recommend that

each employee who enters the classified service pursuant to the provisions of this paragraph shall be credited in his or her classified service position with all seniority previously accrued in the unclassified service as determined by the records of the governing body. Further, such seniority will be credited for all purposes including, but not limited to, layoff, pension, vacation and sick leave. Such credited seniority shall not require under this Decree any payments by a jurisdiction to a pension fund in excess of any amounts previously paid into such fund on behalf of the affected employee. Breaks in service shall not be computed in establishing an employee's seniority rights under this paragraph unless such break in service was occasioned by documented illness or other documented physical disability.

33. All current classified employees who previously entered the classified service from an unclassified laborer position either through promotion or reallocation shall likewise be credited immediately upon the entry of this decree with all seniority previously accrued in the unclassified service. Such seniority shall be computed and credited in the same manner as provided for in paragraph 32.

VII. ADOPTION OF AFFIRMATIVE ACTION PLANS

34. If a jurisdiction which is a defendant in these actions adopts, and the Court approves, a Consent Decree with the United States and/or any other plaintiff in these actions, or if the Court enters a litigated Decree in resolution of the claims of employment discrimination of the United States and/or any other plaintiff in these actions, which Decree establishes hiring and/or promotion goals

for blacks or women for positions in the classified service, the Personnel Board shall seek to insure that it recruits and certifies sufficient numbers of qualified blacks and women to afford any such jurisdiction a reasonable opportunity to meet the goals of its Consent Decree. As a means of insuring that sufficient numbers of blacks and women are certified to meet the goal of this Consent Decree or a Consent Decree or litigated Decree with a defendant jurisdiction, the Personnel Board may certify at least three eligibles for any job vacancy in the classified service and, where necessary to meet such goals, may expand further the number of eligibles certified for a particular job vacancy.

The Personnel Board shall be afforded a reasonable opportunity to review a Consent Decree of another defendant prior to its approval by this Court. If the Board determines that even if it complies fully with the recruitment and testing provisions of this Decree, it will not be able to certify sufficient numbers of qualified blacks or women to afford another defendant a reasonable opportunity to meet a particular goal established by its Consent Decree, the Board may move the Court to relieve it of any liability under this paragraph concerning that particular goal. The Board may not seek relief from liability under this paragraph concerning any goal(s) set by this Consent Decree or a Consent Decree of a defendant jurisdiction for any of the jobs identified in paragraphs 7, 24 and 25 of this Decree.

35. If a defendant jurisdiction fails or refuses to enter into a Consent Decree with the United States and/or any other plaintiff in this action, the Personnel Board retains the right to consider and approve or disapprove

any affirmative action plans which may be submitted to the Personnel Board by any defendant jurisdiction pursuant to Rule 4.5(h) of the Board's Rules and Regulations. The parties recognize that any such affirmative action plans, if approved by the Personnel Board, shall not constitute a waiver by the plaintiffs of any of their claims of employment discrimination or appropriate relief against any such defendant jurisdiction in these consolidated actions.

VII. INDIVIDUAL RELIEF

A. Back Pay

36a. The Personnel Board agrees to pay the sum of $35,000 in full and complete settlement of the plaintiffs' claims against the Personnel Board for monetary relief. The Board shall deposit this sum in a trust account bearing interest at commercial rates within thirty (30) days after this Court gives provisional approval to this Consent Decree. In the event the Court refuses to give final approval to the Decree, this sum shall be returned to the Personnel Board with any interest accrued on such sum. This sum shall be used to compensate the class of blacks identified in Appendix B of this Decree. Back pay relief for the blacks identified in Appendix A of this Decree will be afforded under the Consent Decree with the City of Birmingham. The members of the subclass identified in Appendix B do not wave any rights they may have for monetary or other relief against any other defendants in these consolidated actions other than the Personnel Board.

36b. Each member of the class identified in Appendix B who files a timely response to the notice of right to participate in the back pay settlement and this Decree (Appendix F), shall receive a pro rata share of the $35,000, provided that no such individual payments shall be made to any such person until that individual has filed with the Clerk of the Court a signed and notarized release in the form set forth in Appendix C.

B. Relief For Named Private Plaintiffs

37. The plaintiffs and the Personnel Board acknowledge that Ida McGruder, John Martin, Wanda Thomas, and Eugene Thomas (all named plaintiffs in *Martin, et al.* v. *City of Birmingham,* et al.) (Civil Action No. 72-17-S) were previously certified as qualified for certain positions with the City of Birmingham and/or Jefferson County. In the event that the City of Birmingham and/or Jefferson County agrees to offer employment opportunities to any of the above named individuals, the Personnel Board authorizes their hiring without need for further certification.

C. Notification of Right To Present A Claim for Individual Relief

38. Within ten (10) days after the Court grants final approval to this Consent Decree, written notices will be given by the Personnel Board by certified mail to each of the class members identified in Appendix B. Notice to such individuals shall be sent to their last known address. The form of the notice is attached as Appendix D. Proof

of claim forms (attached as Appendix E) will be included with the individual notices to class members.

39. Each class member shall be required to file his or her proof of claim form with the Clerk of the Court within a date no more than sixty (60) days from the date of mailing. Within forty-five (45) days after receipt of all timely proof of claim forms, counsel for the plaintiffs will submit to the Court and counsel for Personnel Board a report listing each class member who, in their view, is entitled to participate in the back pay provisions of this Consent Decree. In no event will the sum of the individual monetary awards to be made under this Decree exceed the sum of $35,000.

40. Within twenty (20) days after the submission of the plaintiff's report, the Personnel Board shall notify by certified mail each of the class members who filed a timely request to be considered for individual relief of the proposed awards of relief to such person, if any. This notice shall also inform each of these individuals of their right to object to the relief, if any, as contained in the report and that they must file their objection in writing with the Clerk of the Court within fifteen (15) days of their receipt of this notice.

41. The Court shall thereafter, and as soon as practicable, schedule a hearing at which it will rule upon any objections to the report which have been timely filed. At the conclusion to such hearing the Court shall determine whether to give final approval (or approval with modifications) to the awards of individual relief.

D. Implementation of Individual Relief

42. Any person entitled to individual relief under this Decree, in order to obtain such relief, must sign a notarized release which will be provided that person by the Personnel Board in accordance with paragraph 43, *infra*, and return such notarized release to the Board within thirty (30) days of that person's receipt thereof. Any such individual who either does not sign such a notarized release or, alternatively, and absent good cause, does not return such signed notarized release to the Board within thirty (30) days of that person's receipt thereof, shall be deemed to have waived his or her entitlement to such relief. Such release shall provide that the relief to which that person is entitled under this Decree, if accepted, shall be in full and final settlement of any and all claims against the Board based upon allegations of racial or sexual discrimination occurring prior to the date such release is signed. Such release shall be in the form exemplified by Appendix C attached hereto.

43. The Personnel Board shall send a notice to each of the persons entitled to individual relief informing them that the Court has given final approval to their right to such relief under this Decree. This notification shall be in writing, be made by certified mail, return receipt requested, and shall be approved as to substance and form by the plaintiffs prior to mailing. Included with such notice will be a copy of this Decree and the release form as described in paragraph 42 above. Such notification also shall state that if the recipient has any questions about the notice, he or she may contact counsel for the Personnel Board or counsel for the plaintiffs whose

names, addresses and phone numbers shall be listed in the notice, or their own counsel.

44. As the Personnel Board receives releases from the class members entitled to a back pay award under this Decree, it shall immediately issue a check drawn from the back pay fund established by this Decree to such person in the amount of his or her back pay award.

IX. NOTICE OF PROVISIONAL APPROVAL OF THE CONSENT DECREE AND FAIRNESS HEARING

45a. Within ten (10) days after provisional approval of this Consent Decree by the Court, notice will be issued by publication in the Sunday edition of the Birmingham News for two consecutive weeks, and in the Birmingham Times on one weekday directed to all interested persons informing them of the general provisions of this Decree and of their right to review a copy of the Decree which will be on file with the Clerk of the Court. Within the same ten (10) day period, individual notice will also be given of the general provisions of this Decree by the Personnel Board to the subclasses identified in Appendix C. The cost of mailing and publication of any notices to be made under this Decree shall be paid by the Personnel Board. Both the notices by publication and the individual notices shall inform persons to which such notices are directed of their right to be heard and to file objections, if any, to this Decree. Such objections must be filed with the Clerk of the Court by a date to be set by the Court in its Order granting provisional approval to this Decree. The Court shall thereafter, and on a date(s) to be fixed by the Court in its Order granting provisional approval to the

Decree, schedule a fairness hearing at which those persons who file timely objections to the Decree will be heard. At the close of such hearing, or as soon as practicable thereafter, the Court shall rule upon such objections and grant final approval of disapproval to this Consent Decree. The Court shall, however, withhold final approval of the awards of individual relief to be made under this Decree (except the relief to be granted the individual named plaintiffs in the *Martin* case and the certifications for promotions to be made to the individuals named in Appendix A) until those individuals who file a timely response to the notice of right to present a claim for relief under paragraph 39 above are notified of their individual awards, if any, and are afforded an opportunity to be heard and to file any objections they may have to those awards.

X. RECORDS AND REPORTS

47. Within 60 days of the entry of this Consent Decree and thereafter semi-annually the Personnel Board shall provide counsel for the plaintiffs with the following information:

a. A summary report (or computer tape) showing the total number of permanent, non-probationary employees by race and sex in both the classified and unclassified service in each job classification of each department for each of the jurisdictions currently served by the Personnel Board.

b. A summary report (or computer tape) showing the total number of probationary

employees by race and sex in the classified service in each job classification of each department for each of the jurisdictions currently served by the Personnel Board.

c. A summary report (or computer tape) showing the total number of employees by race and sex employed under the Comprehensive Employment and Training Act (CETA) in each job classification of each department for each of the jurisdictions currently served by the Personnel Board.

d. A summary report (or computer tape) showing by race, sex and job title the total number of persons certified to and appointed by each department of the jurisdictions currently served by the Personnel Board during the reporting period. The Personnel Board shall also retain for a period of two years for inspection at the written request of counsel for any of the plaintiffs to the Board's legal counsel copies of the individual certification sheets with the individuals certified and appointed identified by race and sex from which the above summary reports or computer tapes are prepared.

e. A summary report (or computer tape) showing the applicant flow by race and sex for each job classification in the classified service. For purposes of this subparagraph the term applicant shall include any person who files a written application with the Personnel Board. Such summary reports or computer tapes shall separately identify by race and sex the number of persons who file written applications with the Personnel Board. In addition, the Personnel Board shall also retain on file for a period of at least 24 months copies of all post cards filled out

by persons who appear at the Personnel Board's main office on which they indicate a desire to be notified of further examinations for classified service positions. The Board shall record the race and sex of the person filling out the card at the time it is received.

f. A summary report of the Personnel Board's recruitment activities during the reporting period which were specifically designed to attract qualified black and women applicants. Included in such report shall be a list of all minority and/or women's organizations or associations and any professional schools, colleges, universities or trade schools where recruitment efforts were made specifically directed towards blacks and/or women, the dates such recruitment efforts were made, and the jobs for which blacks and/or women were being recruited.

48. Within 60 days of the entry of this Consent Decree and thereafter semi-annually, the Personnel Board shall provide counsel for the plaintiffs with the following information for each of the jobs listed in paragraphs 4 and 5 of this Consent Decree and for the jobs of police officer/deputy sheriff, police/sheriff's lieutenant, police/sheriff's captain, firefighter, fire lieutenant, fire captain, labor supervisor and public works supervisor.

(a) The total numbers of persons by race and sex who during the relevant reporting period applied to be tested and/or evaluated for employment.

(b) The total numbers of persons by race and sex who passed and who failed any such tests and/or evaluations for employment.

(c) The identification by name, race and sex of each person selected for appointment during the reporting period by each of the jurisdictions currently served by the Personnel Board.

(d) For any test or selection procedure which was administered during the relevant reporting period provided for above in any of the jobs identified by this paragraph, the Personnel Board shall submit a report detailing the manner in which such tests or selection procedures were scored or graded including the impact of such scoring or grading on black applicants, an analysis of the reliability and standard error of measurement of the test scores, the mean scores or grades of all applicants, white applicants, and blacks [sic] applicants, and the standard deviations of the scores or grades of all applicants, white applicants, and black applicants on each such test or selection procedure. If any such test scores or grades on a selection procedure are used for ranking purposes, such report shall include the raw data of the impact on black applicants of the use of such test scores for ranking purposes together with an explanation of the ranking procedures. Attached to such a report shall be copies of the eligibility lists identified by race and sex which were complied as a result of the administration of any of the tests or selection procedures during the relevant reporting period covered by the report.

49. Within 60 days of the entry of this Consent Decree the Personnel Board shall provide counsel for the plaintiffs with the following information with respect to the Board's promotional potential rating system:

(a) the number of persons by race, department, job classification and jurisdiction who received a promotional potential rating during the rating period immediately preceding the entry of this Decree;

(b) the number of persons by race, department, job classification and jurisdiction who scored above and who scored below the minimum score established for promotional eligibility during that rating period.

As new rating cycles are completed, the Personnel Board shall, within 60 days of the completion of such cycle, submit to counsel for the plaintiffs impact data in the form required by subparagraphs (a) and (b) above.

50. If the Personnel Board institutes a new promotional potential rating system in accordance with the provisions of paragraph 11, the reports required to be submitted to counsel for the plaintiffs under that paragraph shall include the following information:

(a) the number of persons by race, department, and job classification who received a promotional potential rating during the experimental rating period;

(b) the number of persons by race, department and job classification who scored above and who scored below the minimum score established for promotional eligibility;

(c) the name, race, department, job classification and promotional potential score of each person who received a promotional potential rating during the experimental rating period. Also included next to their names shall be an identification of the race of the rater or raters

who issued that person's promotional potential rating.

51. In the Personnel Board establishes any training programs in accordance with the provisions of paragraph 15 of this Decree, the Board shall provide counsel for the plaintiffs with the following information for each training class:

(a) The total number of persons by race, sex, department and jurisdiction who applied for such training;

(b) The total number of persons by race, sex, department and jurisdiction who were selected for training;

(c) The total number of persons, if any, by race, sex, department and jurisdiction who were disqualified from or failed to complete the training program;

(d) The total number of persons by race, sex, department and jurisdiction who successfully completed such training.

52. The Personnel Board shall retain on file and available for inspection at the written request of any of the plaintiffs' legal counsel to the Board's legal counsel copies of all tests, training and experience evaluations, promotional potential ratings, and any other selection instruments together with any documents, forms, reports, statistical compilations and other records which relate to the construction, scoring, use, and validity of such selection procedures.

53. The Personnel Board shall retain for a period of two years on file and available for inspection at the request of any of the plaintiffs' legal counsel copies of all

formal written applications for each job in the classified service. If any applicant is determined by the Personnel Board not to be qualified for employment in the job or jobs for which the applicant has applied, the reasons for such disqualification shall be recorded and kept on file with the applicant's application.

XI. EFFECT OF COMPLIANCE

54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the Personnel Board with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981 and §1983, and the Fourteenth Amendment to the Constitution of the United States as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law.

XII. RETENTION OF JURISDICTION

55. The Court retains jurisdiction of this action for such further relief or other orders as may be appropriate. At any time after six (6) years subsequent to the date of the entry of the Consent Decree, any party to this Decree may move the Court upon forty-five (45) days notice to

the other, to dissolve this Consent Decree. In considering whether the Consent Decree shall be dissolved, the Court will take into account whether the primary purposes of this Consent Decree have been substantially achieved.

Entered and ordered this _____ day of _____, 1981.

/s/ _____
UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO: DATED:

For Plaintiff United States:

/s/ Richard J. Ritter May 19, 1981

For the Plaintiffs in *Martin et al.* v. *City of Birmingham, et al.*:

/s/ Susan W. Reeves/Stephen L. Spitz May 19, 1981

For the Plaintiffs in *Ensley Branch of the N.A.A.C.P., et al.* v. *Seibels, et al.*:

/s/ Oscar W. Adams, III May 19, 1981

For the Personnel Board:

/s/ David P. Whiteside, Jr. May 19, 1981

Appendix A

	Name	Job
1.	Charles Jordan	Construction Equipment Operator*
2.	Trennon Nickerson	Construction Equipment Operator*
3.	Roosevelt Parker	Construction Equipment Operator*
4.	Mose Shine, Jr.	Construction Equipment Operator*
5.	Charles Boyd	Labor Supervisor
6.	Herman Copes	Labor Supervisor
7.	Avance Lomax	Labor Supervisor
8.	Samuel Bandy	Public Works Supervisor**
9.	A. B. Campbell	Public Works Supervisor**
10.	Willie Cargill	Public Works Supervisor**
11.	Major Florence	Public Works Supervisor**
12.	Willie Gossum	Public Works Supervisor**
13.	Clyde Hill	Public Works Supervisor**
14.	Arthur Jones	Public Works Supervisor**
15.	Cleo Lewis	Public Works Supervisor**
16.	Alfred Menifield	Public Works Supervisor**
17.	Orman Skinner	Public Works Supervisor**

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*Certification for promotion shall be to a future vacancy at the landfill unless the individual expresses to the Personnel Board in writing a desire to be certified for a Construction Equipment Operator position in another location of the Street and Sanitation Department.

**Certification for promotion shall be to a future vacancy in a Public Works Supervisor (or Refuse Collection Supervisor) position in sanitation unless the individual expresses to the Personnel Board in writing a desire to be certified for a Public Works Supervisor position in another area of the Streets and Sanitation Department. If any such individual indicates in writing that he would be interested in a Public Works Supervisor position in either sanitation or street construction and street maintenance, he shall be certified to the first permanent vacancy which arises in either position in accordance with the provisions of paragraph 21 of this Decree.

18.	James Parker, Jr.	Refuse Truck Driver
19.	Charlie Simmons	Refuse Truck Driver

Appendix B

All black persons who took the 10-C Policeman Test which resulted in the eligibility lists for police officers and deputy sheriffs which were in effect between April 25, 1975 and January 10, 1977, and the 20-B Firefighter Test which resulted in the eligibility lists for firefighters in effect between July 8, 1975 and January 10, 1977, who have not been hired for police officer, deputy sheriff or firefighter positions by a defendant jurisdiction in any of these consolidated actions or who subsequent to the entry of this Court's Order of January 10, 1977, were hired by a defendant jurisdiction but who may have been hired earlier but for their rank on such eligibility lists.

Appendix C

RELEASE

For and in consideration of the sum of [*sum spelled out*] Dollars ($__) and all other relief to be provided me by the Jefferson County Personnel Board pursuant to the provisions of the *Consent Decree in Resolution of Issues Involving the Jefferson County Personnel Board* entered by the Honorable _____, United States District Judge, on [*date*] in the consolidated actions of *United States v. Jefferson County, et al.*, Civil Action Nos. 75-P-0666-S, 74-Z-17-

S, 74-Z-12-S, I [*full name of claimant*], hereby release and discharge the Jefferson County Personnel Board of an from all legal and equitable claims arising out of this action or any other legal, equitable or administrative claims or causes of action arising out of alleged racial discrimination by the Personnel Board, in violation of any Federal, state or local equal employment opportunity laws, statutes, regulations or ordinances occuring [sic] prior to the date of the execution of this Release. I further agree to discontinue any pending claim or action, whether legal, equitable or administrative, alleging race discrimination by the Jefferson County Personnel Board except with respect to any questions of attorneys fees and/or costs which may be pending in said action.

I carefully have read this Release as well as the accompanying Consent Decree entered [*date*]; I fully comprehend and understand the contents thereof; and I execute this Release of my own free act and deed.

Signed this __ day of ____, 1981.

[Signature]
Social Security Number _____

Subscribed and sworn to before me
this undersigned authority on this
__ day of ____, 1981, to certify
which witness my hand and seal of office.

_____
NOTARY PUBLIC

APPENDIX D

Notice To [Subclass definition]:

This announcement is to inform you of your right to present a claim for back pay relief under a Consent Decree between the plaintiffs and the Jefferson County Personnel Board in the consolidated actions of: *Ensley Branch of the N.A.A.C.P. et al. v. City of Birmingham, et al.*, C.A. No. 74-Z-12-S; *John W. Martin, et al. v. City of Birmingham*, C.A. No. 74-Z-17-S; and *United States of America v. Jefferson County, et al.*, C.A. No. 75-P-0666-S.

If you are a member of the subclass described in the caption of this notice you may fill out the attached proof of claim form and mail it to the Clerk of the Court for Northern District of Alabama. Enclosed for your use is an unstamped envelope containing the mailing address of the Clerk of the Court.

If you wish to present a claim for back pay relief under this Consent Decree, your proof of claim form must be received by the Clerk of the Court by no later than __ o'clock on ____, 1981. If you do not file this proof of claim form with the Clerk of the Court by that date then, absent good cause shown, you will be deemed to have waived your right to present a claim for back pay relief under this Consent Decree.

After your proof of claim form is filed, you will be contacted by attorneys for the plaintiffs. They will review with you your proof of claim form and the relevant facts which support your claim. Thereafter these attorneys will make a determination of whether you claim merits an award of back pay relief under this Consent Decree.

After final determinations have been made of the back pay awards to be made under this Consent Decree, you will be notified of your individual award, if any. If you do not receive an award of individual relief under the Consent Decree, or if you are not satisfied with the amount of relief provided to you, you will have the right to file an objection to the resolution of your claim with the Clerk of the Court. That objection will be subsequently ruled upon by the District Court. The procedures for filing any such objections will be explained to you in the notice you will receive informing you of your award of relief, if any.

If you have any questions with respect to this notice, the Consent Decree, or the procedures for filing your proof of claim form, you may call or write any of the attorneys listed below:

Attorneys for the United States:

Richard J. Ritter
United States Department of
Justice
Civil Rights Division
Washington, DC 20530
(202) 633-4086

Caryl Privett
Assistant United States
Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, Alabama 35203
(205) 254-1785

Attorneys for the plaintiffs in Martin, et al. v. the City of Birmingham:

Stephen L. Spitz
Lawyers Committee for
Civil Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, DC 20005
(202) 628-6700

Susan Reeves
Reeves & Still
2027 First Avenue North
Suite 400
Birmingham, AL 35203
(205) 322-7479

APPENDIX E

Proof of Claim Form

Please list your:

Name: _____
Current Address: _____
Current Telephone Number: _____

Please check the appropriate box or boxes if you fall within either or both of the classes described below. If you check either of the boxes then please complete this proof of claim form by supplying the additional information requested below.

[ ] I am a black person who took the written test administered by the Personnel Board of Jefferson County for the

job of police officer. I wish to present a claim for relief under the Consent Decree with the Personnel Board of Jefferson County.

[ ] I am a black person who took the written test administered by the Personnel Board of Jefferson County for the job of firefighter. I wish to present a claim for relief under the Consent Decree with the Personnel Board of Jefferson County.

If you check either of the boxes above, please indicate in the space provided below whether you were contacted for an interview for that job by any of the police or fire departments of any of the following jurisdictions: Birmingham, Jefferson County, Bessemer, Fairfield, Fultondale, Gerdendale, Homewood, Hueytown, Midfield, Mountain Brook, Pleasant Grove, Tarrant, Vestavia Hills. If so, please indicate the jurisdiction(s) which contacted you.

_____

_____

_____

_____

If you were contacted for an interview by any of the above jurisdictions please indicate in the space provided below whether you appeared for that interview, the approximate date(s) of such interview, and whether you were offered employment as a police officer of firefighter with that jurisdiction.

_____

_____

_____

_____

_____

_____

_____

_____

Finally, please indicate in the space provided below which of the jurisdictions listed above you would have considered accepting an offer of employment with if such an offer would have been made to you. You may list as many jurisdictions as you were interested in.

_____

_____

_____

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

_____

Signature

Date: _____

_____

A Study of the Utilization of Blacks in the Birmingham Fire and Rescue Service

David W. Peterson, PhD
Christopher K. Northup
PRI Associates, Inc.
1905 Chapel Hill Road
Durham, NC 27707
919-493-7534

August 30, 1991

A Study of the Utilization of Blacks in the Birmingham Fire and Rescue Service

I. Introduction and Conclusion

The City of Birmingham requested PRI Associates, Inc. to study two major issues:

> During the period from July 2, 1965 through the date of the 1981 Consent Decree, were black firefighters hired by the City in proportion to their labor market availability, or was there a statistically significant difference between the actual and expected numbers of black firefighter hires?
>
> If black firefighters had been hired and promoted nondiscriminatorily throughout the period from July 2, 1965 through April 30, 1990, how would the resulting representation of blacks among firefighters compare to their actual representation as of April 30, 1990?

The results of our studies are as follows:

Hiring of Black Firefighters from 1965 to 1981

During the period from July 2, 1965 through August 17, 1981 there were 552 firefighters hired by the City, of whom 52 were black. The number of these 552 people who would have been black if hiring had been done in proportion to the racial composition of the labor market is in the range of 143.0 to 159.6, depending on the method used to estimate the racial composition of that market. The resulting shortfall in the number of blacks actually hired during this period ranges from 91.0 to 107.6. Measured statistically, these shortfalls range from -8.84 to -10.11 standard deviations, which, being well excess of both 2 and 3, are statistically significant by most commonly used standards, and a strong indication that the shortfall from the expected number of blacks occurred as a result of factors other than chance.

Firefighter Work Force Composition as of 4/30/90

As of April 30, 1990 the racial composition of incumbents in the major firefighter job titles was as follows:

Job Title	Total	Black
Fire Battalion Chief	14	1
Fire Captain	28	8
Fire Lieutenant	103	28
Firefighter	475	126

If black firefighters had been hired at a rate consistent with their estimated availability during the July 2, 1965 to April 30, 1990 period and been promoted nondiscriminatorily in accordance with their seniority, the racial composition of the incumbents in the above job titles would have been approximately the same as shown above.

Conclusion

Based on the above results, it appears that the City hired relatively few blacks as firefighters overall during the period July 2, 1965 to August 17, 1981. However, the effects of this practice in denying blacks access to both entry level and (by way of promotion) advanced firefighter jobs had been substantially eradicated by April 30, 1990. That is, had the City hired and promoted firefighters nondiscriminatorily from July 2, 1965 to April 30, 1990, the number of blacks in the primary firefighter jobs would have been just about the same as the numbers in fact holding those jobs on that date.

II. Underlying Data

Our studies are based on two major groups of data: personnel data received from the City and statistical data from the 1960, 1970 and 1980 U.S. Census data.

Personnel Data

The personnel data on which we relied are from the following documents and sources:

1. Birmingham Fire & Rescue Service, Source for Analysis of Work Force Hires & Promotions, Period: 1/1/65 – 12/31/81
2. Birmingham consent decree reports
3. Birmingham payroll tapes 1986-1990
4. 1976 and 1981 Birmingham work force reports
5. Supplemental personnel data

To identify persons hired during the 1965 to 1981 period we used the information in "Birmingham Fire & Rescue Service, Source for Analysis of Work Force Hires & Promotions, Period: 1/1/65 – 12/31/81." The hires identified from this source were cross-checked where possible against persons on the 1976 and 1981 Birmingham work force reports. For the period starting in the latter part of 1981 up through 1990, hires were identified from the list of hires in the semi-annual consent decree reports filed by the City covering the period from August of 1981 and forward. These hires were checked against data from the City's payroll system from 1986 to 1990. As appropriate, data were supplemented or verified by reference back to personnel files at the City.

U.S. Census Data

The census data on which we relied are from the following sources:

1. Census of Population: 1960, Volume I, Characteristics of the Population, Part 2, Alabama, Tables 35 and 87.

2. U.S. Census of Population: 1960, Final Report PC(2)-6B, Subject Reports, Journey to Work, Table 1.
3. 1970 Census of Population and Housing, Fourth Count Population Summary Tape, Alabama, Table 54.
4. 1970 Census of Population, Subject Reports, PC(2)-6D Journey to Work, Table 1.
5. 1980 Census of Population, Summary Tape File 3C, Alabama.
6. Census of Population, 1980; Journey-to-Work [machine-readable data file]/prepared by the Bureau of the Census. – Washington: The Bureau [producer and distributor]. 1985.

To calculate the availability of black firefighters during the relevant period, we used data from the 1960, 1970 and 1980 U.S. Censuses. These data consist of Civilian Labor Force counts by race for the City of Birmingham, Alabama and the surrounding counties, and Journey-to-Work counts from the same Censuses indicating the number of persons working in Birmingham and in the surrounding county (Jefferson), by their county of residence.

III. The Hiring of Black Firefighters from 1965 to 1981

In this study we estimate the number of persons hired each year as firefighters who would have been blacks, if hiring decisions had been made without regard to race. This number is compared with the actual number of black persons hired that year, and the difference is expressed as a number of standard deviations. The object

is to determine the extent, if any, to which blacks are underrepresented among persons hired as firefighters.

The steps followed in this analysis are as follows:

A. The persons hired by the City into firefighter positions from July 2, 1965 through August 17, 1981 were identified along with their race. These data were summarized by year showing the total number of hires and those that were black.

B. Estimates of black availability in the 1960 Civilian Labor Force for persons who might be hired by City as firefighters were calculated as follows:

1. Using the 1960 Census Journey-to-work data, we determined the number of persons residing in each of the counties surrounding the City as well as Jefferson county itself (in which Birmingham is located) who work in the City of Birmingham. Next we calculated the percentage of all Birmingham workers who reside in each of the counties that contribute such workers.

2. For each of the residence counties identified above, we obtained the total number of persons in the Civilian Labor Force residing there and the number of blacks among them, and then calculated the percent black representation.[1]

3. For each of the residence counties, the percent black representation in the Civilian Labor

---

[1] In the 1960 census, blacks were not tallied as a separate group. For that census only, we used non-white counts in lieu of (unavailable) black counts. In the 1970 and 1980 censuses, separate counts for blacks were published, and we used such counts in all calculations pertaining to years subsequent to and including 1970.

Force was multiplied by the percentage of all Birmingham workers who reside in that county. The results of these calculations were summed to produce the weighted black availability for persons working in the City of Birmingham (Birmingham Availability).

4. Steps 1 through 4 were repeated except that the Journey-to-Work data were for persons working in Jefferson county rather than the City of Birmingham. This resulted in the weighted black availability for persons working in Jefferson County (Jefferson County Availability).

C. Estimates analogous to those in B were calculated using 1970 Census data, and also using 1980 Census data.

D. For each year in which there were hires identified in step A, the weighted county availability calculated in steps B and C based on Birmingham Availability from the immediate preceding decennial census were used. That is, for hire years 1965 to 1969, the weighted 1960 U.S. Census availability estimates were used, for hire years 1970 to 1979, the weighted 1970 U.S. Census data were used, and for hire years 1980 and 1981, the weighted 1980 U.S. Census data were used.

E. For each year in D the expected number of black hires was calculated by multiplying the total number of hires for that year by the weighted black availability. Then the difference between the expected and actual numbers of black hires was calculated, along with the variance and the number of standard deviations by which the expected and actual numbers of black hires differ.

F. For all hire years, an overall number of standard deviations was calculated using the differences and variances from each year.

G. These calculations (D - F) were repeated using Jefferson County Availability data.

H. Using Birmingham Availability (from steps B and C), we calculated availability estimates for each of the years between censuses using linear interpolation. Steps D through F were then repeated using the interpolated Birmingham Availability appropriate to each hire year, rather than the Birmingham Availability from the previous decennial census.

I. The calculation in H was repeated using Jefferson County Availability.

Results

The results of these calculations are displayed in Tables 3.1 - 3.4.

Table 3.1
City of Birmingham Fire and Rescue Service Firefighters Hires
Black Availability Weighted by Commuters to Birmingham (No Extrapolation)

Job Title of Hire	Year of Hire	Total Hires	Black Hires	Black Avail %	Expected Black Hires	Expect-Actual Hires	No. of Std Deviations
FIRE-FIGHTERS	1965	15	0	31.78	4.8	-4.88	-2.64
	1966	17	0	31.78	5.4	-5.4	-2.81
	1967	18	0	31.78	5.7	-5.7	-2.90
	1968	99	1	31.78	31.5	-30.5	-6.58
	1969	41	0	31.78	13.0	-13.0	-4.37
	1970	25	0	27.39	6.8	-6.8	-3.07
	1971	45	0	27.39	12.3	-12.3	-4.12
	1972	33	0	27.39	9.0	-9.0	-3.53
	1973	37	0	27.39	10.1	-10.1	-3.74
	1974	49	6	27.39	13.4	-7.4	-2.38
	1975	10	0	27.39	2.7	-2.7	-1.94
	1976	22	3	27.39	6.0	-3.0	-1.45
	1977	109	34	27.39	29.9	4.1	0.89
	1978	27	8	27.39	7.4	0.6	0.26
	1979	5	0	27.39	1.4	-1.4	-1.37
		552	52		159.6	-107.6	-10.11

Note: No firefighters were hired from January 1, 1980 to August 17, 1981.
Source: BIRM HIAVCLF1 08/27/91 at 21:00:01, pages 12 to 13.

Table 3.2
City of Birmingham Fire and Rescue Service Firefighters Hires
Black Availability Weighted by Commuters to Birmingham (Extrapolation)

Job Title of Hire	Year of Hire	Total Hires	Black Hires	Black Avail %	Expected Black Hires	Expect-Actual Hires	No. of Std Deviations
FIRE-FIGHTERS	1965	15	0	29.59	4.4	-4.4	-2.51
	1966	17	0	29.15	5.0	-5.0	-2.64
	1967	18	0	28.71	5.2	-5.2	-2.69
	1968	99	1	28.27	28.0	-27.0	-6.02
	1969	41	0	27.83	11.4	-11.4	-3.98
	1970	25	0	27.39	6.8	-6.8	-3.07
	1971	45	0	27.47	12.4	-12.4	-4.13
	1972	33	0	27.55	9.1	-9.1	-3.54
	1973	37	0	27.62	10.2	-10.2	-3.76
	1974	49	6	27.70	13.6	-7.6	-2.42
	1975	10	0	27.78	2.8	-2.8	-1.96
	1976	22	3	27.85	6.1	-3.1	-1.49
	1977	109	34	27.93	30.4	3.6	0.76
	1978	27	8	28.01	7.6	0.4	0.19
	1979	5	0	28.08	1.4	-1.4	-1.40
		552	52		154.4	-102.4	-9.71

Note: No firefighters were hired from January 1, 1980 to August 17, 1981.
Source: BIRM HIAVCLF1 08/27/91 at 21:00:01, pages 14 to 15.

Table 3.3
City of Birmingham Fire and Rescue Service Firefighters Hires
Black Availability Weighted by Commuters to Jefferson County (No Extrapolation)

Job Title of Hire	Year of Hire	Total Hires	Black Hires	Black Avail %	Expected Black Hires	Expect-Actual Hires	No. of Std Deviations
FIRE-FIGHTERS	1965	15	0	29.89	4.5	-4.5	-2.53
	1966	17	0	29.89	5.1	-5.1	-2.69
	1967	18	0	29.89	5.4	-5.4	-2.77
	1968	99	1	29.89	29.6	-28.6	-6.28
	1969	41	0	29.89	12.3	-12.3	-4.18
	1970	25	0	25.73	6.4	-6.4	-2.94
	1971	45	0	25.73	11.6	-11.6	-3.95
	1972	33	0	25.73	8.5	-8.5	-3.38
	1973	37	0	25.73	9.5	-9.5	-3.58
	1974	49	6	25.73	12.6	-6.6	-2.16
	1975	10	0	25.73	2.6	-2.6	-1.86
	1976	22	3	25.73	5.7	-2.7	-1.30
	1977	109	34	25.73	28.0	6.0	1.31
	1978	27	8	25.73	6.9	1.1	0.46
	1979	5	0	25.73	1.3	-1.3	-1.32
		552	52		149.9	-97.9	-9.38

Note: No firefighters were hired from January 1, 1980 to August 17, 1981.
Source: BIRM HIAVCLF1 08/27/91 at 21:00:01, pages 16 to 17.

Table 3.4
City of Birmingham Fire and Rescue Service Firefighters Hires
Black Availability Weighted by Commuters to Jefferson County (Extrapolation)

Job Title of Hire	Year of Hire	Total Hires	Black Hires	Black Avail %	Expected Black Hires	Expect-Actual Hires	No. of Std Deviations
FIRE-FIGHTERS	1965	15	0	27.81	4.2	-4.2	-2.40
	1966	17	0	27.39	4.7	-4.7	-2.53
	1967	18	0	26.98	4.9	-4.9	-2.58
	1968	99	1	26.56	26.3	-25.3	-5.76
	1969	41	0	26.14	10.7	-10.7	-3.81
	1970	25	0	25.73	6.4	-6.4	-2.94
	1971	45	0	25.68	11.6	-11.6	-3.94
	1972	33	0	25.62	8.5	-8.5	-3.37
	1973	37	0	25.57	9.5	-9.5	-3.57
	1974	49	6	25.52	12.5	-6.5	-2.13
	1975	10	0	25.47	2.5	-2.5	-1.85
	1976	22	3	25.41	5.6	-2.6	-1.27
	1977	109	34	25.36	27.6	6.4	1.40
	1978	27	8	25.31	6.8	1.2	0.52
	1979	5	0	25.26	1.3	-1.3	-1.30
		552	52		143.0	-91.0	-8.84

Note: No firefighters were hired from January 1, 1980 to August 17, 1981.
Source: BIRM HIAVCLF1 08/27/91 at 21:00:01, pages 18 to 19.

Conclusions

It is evident from Tables 3.1 through 3.4 that the City hired relatively few blacks into firefighter positions in each of the years 1965 up until the mid 1970s. The number of standard deviations by which the number of blacks falls below parity is consistently in excess of 2 in these years, regardless of the methods used to estimate the availability of blacks. It is also apparent that, overall, during the period July 2, 1965 through August 17, 1981, relatively few blacks were hired into firefighter positions.

The number of standard deviations by which the total number of blacks hired lags parity with the labor market is in the range of almost 9 to a little more than 10, depending on the method used to estimate parity. Such large numbers of standard deviations are a strong indication that chance factors in the selection of new hires cannot reasonably account for the large departures from parity, and that some other factor or factors are probably influencing the selection process, with the effect of reducing the number of blacks hired significantly below parity with the labor market availability estimate.

IV. Firefighter Work Force Composition as of 4/30/90

The Firefighter Work Force Composition Study compares the racial composition of the persons employed in various firefighter jobs as of April 30, 1990 to the composition that would have resulted had the City hired and promoted people nondiscriminatorily throughout the period July 2, 1965 to April 30, 1990. The study divides the April 30 incumbents into two groups: those hired before July 2, 1965 and those hired after. Those hired

before are presumed to have a proper claim on their current jobs, inasmuch as they were hired before the Civil Rights Act of 1964 became effective, and they now have considerable experience and job seniority.

Those hired on or after July 2 of 1965 are considered to have a proper claim on their current jobs insofar as their seniority is concerned, but not necessarily as far as their race is concerned. That is, for a white incumbent hired before the late 1970s, it is quite possible that, but for the City's preference for hiring whites into firefighter positions that year, the person would have been a black.

To determine the number of blacks who would have been incumbent in each position as of April 30, 1990 had the City not discriminated in hiring or promotion since July 2, 1965, we construct a randomization model in which the races of incumbents as of April 30, 1990 are assigned randomly based on the racial composition of the labor market in the year in which they were hired. We then compare the actual number of blacks incumbent in each position to the standard set by this assignment.

This process by which the standard of comparison is calculated evidently postulates not only nondiscriminatory hiring, but also nondiscriminatory promoting. That is, it presumes that had an actual April 30, 1990 nonblack lieutenant been black, that person would still have been a lieutenant on April 30, 1990.

The steps in this process are as follows:

A. Persons hired from July 2, 1965 through April 30, 1990, and still employed by the city as of April 30, 1990, are identified along with their

race and initial job. These data are tallied by year of hire.

B. For each year in which there were hires identified in step A, the weighted county availability data based on workers in the City of Birmingham (Birmingham Availability) from the corresponding decennial census are used. For hire years 1965 to 1969, the weighted 1960 U.S. Census availability estimates are used, for hire years 1970 to 1979, the weighted 1970 U.S. Census data are used, and for hire years 1980 to 1990, the weighted 1980 U.S. Census data are used.

C. For each year in B, the parity number of black hires is calculated by multiplying the number of hires for that year (as determined in step A) by the weighted black availability, and rounding the result up or down to the nearest whole number.

D. Of the new hires that year, a number equal to the parity number are chosen at random and assigned the artificial race designation Black; the rest of the new hires are given the artificial race designation White.

E. The persons incumbent in firefighter positions as of April 30, 1990 are identified, and compared with the hires analyzed in D.

F. The racial composition of the incumbents in each firefighter job is determined using the artificial race designation assigned to D for persons hired on or after July 2, 1965, and the real race of persons hired prior to that.

G. Steps D - F are repeated 1000 times, each time with a different random assignment of artificial race, and the average number of resulting blacks incumbent in each of the firefighter jobs is calculated. For each such job, this is the expected or parity number of black incumbents. It is the approximate number of blacks who would have held that job on April 30, 1990 if the City's hiring and promotion practices had been race neutral throughout the period July 2, 1965 to April 30, 1990.

H. The difference between the parity and actual numbers of blacks in each position as of April 30, 1990 are calculated, along with the variance and number of standard deviations by which the parity and actual numbers of blacks differ.

Results

The results of these calculations are displayed in Tables 4.1 through 4.4.

Table 4.1

City of Birmingham Fire and Rescue Service Work Force as of April 30, 1990
Black Availability Based on Commuters to Birmingham (Not Extrapolated)

EEO Category	Job Title	Total	Expected No. of Blacks	Actual No. of Blacks	Difference	No. of Std Deviations
OFFICIALS/ADMIN	ASST FIRE CHIEF	4	0.0	0	0	-
	DEP FIRE CHIEF	1	0.0	0	0	-
	FIRE CHIEF	1	0.0	0	0	-
		6	0.0	0	0.0	
PROFESSIONAL	FIRE BATTALION CHIEF	14	2.4	1	-1.4	-1.03
	FIRE CAPTAIN	28	6.0	8	2.0	1.01
	FIRE LIEUTENANT	103	26.0	28	2.0	0.53
		145	34.3	37	2.7	
PROTECTIVE-SERVICE	ASST FIRE MARSHALL	1	0.0	0	0	-
	FIREFIGHTER	475	130.4	126	-4.4	-1.10
	SR FIRE PREV INSPECT	3	0.3	0	-0.3	-0.63
		479	130.7	126	-4.7	
		630	165.0	163	-2.0	-0.33

Source: BIRM RND490 08/28/91 at 12:27:21, pages 84-85.

Table 4.2

City of Birmingham Fire and Rescue Service Work Force as of April 30, 1990
Black Availability Based on Commuters to Birmingham (Extrapolated)

EEO Category	Job Title	Total	Expected No. of Blacks	Actual No. of Blacks	Difference	No. of Std Deviations
OFFICIALS/ADMIN	ASST FIRE CHIEF	4	0.0	0	0	-
	DEP FIRE CHIEF	1	0.0	0	0	-
	FIRE CHIEF	1	0.0	0	0	-
		6	0.0	0	0.0	
PROFESSIONAL	FIRE BATTALION CHIEF	14	2.2	1	-1.2	-0.95
	FIRE CAPTAIN	28	5.8	8	2.2	1.12
	FIRE LIEUTENANT	103	25.0	28	3.0	0.79
		145	33.0	37	4.0	
PROTECTIVE-SERVICE	ASST FIRE MARSHALL	1	0.0	0		-
	FIREFIGHTER	475	129.7	126	-3.7	-0.93
	SR FIRE PREV INSPECT	3	0.3	0	-0.3	-0.63
		479	130.0	126	-4.0	
		630	163.0	163	0.0	0.0

Source: BIRM RND490 08/28/91 at 12:27:21, pages 93-94.

Table 4.3

City of Birmingham Fire and Rescue Service Work Force as of April 30, 1990
Black Availability Based on Commuters to Jefferson County (Not Extrapolated)

EEO Category	Job Title	Total	Expected No. of Blacks	Actual No. of Blacks	Difference	No. of Std Deviations
OFFICIALS/ADMIN	ASST FIRE CHIEF	4	0.0	0	0	-
	DEP FIRE CHIEF	1	0.0	0	0	-
	FIRE CHIEF	1	0.0	0	0	-
		6	0.0	0	0.0	
PROFESSIONAL	FIRE BATTALION CHIEF	14	2.2	1	-1.2	-0.93
	FIRE CAPTAIN	28	5.6	8	2.4	1.22
	FIRE LIEUTENANT	103	24.2	28	3.8	0.98
		145	32.1	37	4.9	
PROTECTIVE-SERVICE	ASST FIRE MARSHALL	1	0.0	0	0	-
	FIREFIGHTER	475	120.6	126	5.4	1.35
	SR FIRE PREV INSPECT	3	0.3	0	-0.3	-0.63
		479	120.9	126	-5.1	
		630	153.0	163	10.0	1.66

Source: BIRM RND490 08/28/91 at 12:27:21, pages 102-103.

Table 4.4

City of Birmingham Fire and Rescue Service Work Force as of April 30, 1990
Black Availability Based on Commuters to Jefferson County (Extrapolated)

EEO Category	Job Title	Total	Expected No. of Blacks	Actual No. of Blacks	Difference	No. of Std Deviations
OFFICIALS/ADMIN	ASST FIRE CHIEF	4	0.0	0	0	-
	DEP FIRE CHIEF	1	0.0	0	0	-
	FIRE CHIEF	1	0.0	0	0	-
		6	0.0	0	0.0	
PROFESSIONAL	FIRE BATTALION CHIEF	14	2.0	1	-1.0	-0.81
	FIRE CAPTAIN	28	5.4	8	2.6	1.36
	FIRE LIEUTENANT	103	23.1	28	4.9	1.31
		145	30.4	37	6.6	
PROTECTIVE-SERVICE	ASST FIRE MARSHALL	1	0.0	0	0	-
	FIREFIGHTER	475	118.3	126	7.7	1.97
	SR FIRE PREV INSPECT	3	0.3	0	-0.3	-0.63
		479	118.6	126	7.4	
		630	149.0	163	14.0	2.37

Source: BIRM RND490 08/28/91 at 12:27:21, pages 111-112.

Conclusion

It is apparent from Tables 4.1 - 4.4 that the racial composition of incumbents in the main firefighter positions as of April 30, 1990 generally accord well with the composition that would have prevailed had the City's hiring and promoting policies been race neutral since July 2, 1965. This balance is achieved despite the fact that the numbers of blacks hired into firefighter positions from July 2, 1965 until the mid to late 1970s was well below parity with the labor market. Hence it is apparent that the City's hiring and promoting practices since the late 1970s have served to correct the racial imbalances that otherwise would have existed had its practices in the 1960s and early 1970s been continued.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	)	Case No. CV84-P-0903
	)	Birmingham, Alabama
	)	October 21, 1991
	)	9:15 a.m.

* * *

TRANSCRIPT OF NON JURY TRIAL
HELD BEFORE THE HONORABLE
SAM C. POINTER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Wilks Plaintiffs:	RAYMOND P. FITZPATRICK, JR. WILLIAM HANCOCK and DAVID HUNT Johnston, Barton, Proctor, Swedlaw & Naff 1100 Park Place Tower Birmingham, AL 35203
City of Birmingham:	JAMES P. ALEXANDER and JAMES W. MAY Bradley, Arant, Rose & White 1400 Park Place Tower Birmingham, AL 35205
Martin Intervenors:	ROBERT D. JOFFE Cravath Swaine & Moore Worldwide Plaza 825 Eighth Avenue New York, N.Y. 10019

* * *

[p. 115] were?

A. Yes. The first question dealt with the extent to which blacks had been hired in proportion to their availability, as measured by the civilian labor force during the period 1965 to 1981. And what I determined was that blacks were hired in proportions less than their representation in the civilian labor force during that period of time. That is, there was an under hiring of blacks as firefighters overall during the period 1965 through 1981 relative to their presence in the local civilian labor force. That was the first point.

The second point is that if blacks had been hired in proportion to their representation in the local civilian labor force throughout the period of time 1965 through April of 1990 and been promoted without regard to their race, that is, been promoted on the same basis as non blacks, That The representation of blacks in the various ranks in the Birmingham Fire Department, as of April 30th, 1990, would have been just about what it in fact was at that time.

Q. Let's go, if we can, to the steps that you used to construct the labor market availability starting with Page 5 of your report, I believe.

First you might want to describe for Judge Pointer the various census data that you utilized in constructing

* * *

[p. 125] Q. How about with respect to the commuting patterns, have you looked to determine those counties that are

weighted most heavily outside Jefferson and Shelby in the commuting patterns, Journey to work?

A. Yes.

Q. Do you also look at black representation in those counties?

A. Yes.

Q. And what did you determine?

A. Generally speaking, the representation of blacks in these various geographic areas is highest in the City of Birmingham, somewhat lower in the outlying portions of Jefferson County and lower yet in the counties surrounding Jefferson.

Q. So, that if you had excluded those commuting from counties surrounding or elsewhere outside of Jefferson county, you would have raised black availabiility [sic] numbers that you reached?

A. Yes.

Q. Let's talk about the second portion of your study, if we can, that's something I have called Model-2?

A. Yes. I would like to just point out that the four tables are pretty much consistent in the message that they convey. Mainly, that by any method – any reasonable method of estimation I think one would have to conclude that

* * *

[p. 135] fire chiefs, the deputy fire chief, the fire chief, for example, were all hired prior to 1965. And the other people who were hired prior to 1965 were scattered about in various other categories as well.

Q. And your conclusion?

A. The conclusion is that the racial composition of the people rank by rank in the fire department, as of April 30th, 1990, was just about what it would have been if the City had hired firefighters from the civilian labor force, had hired firefighters – had hired black firefighters in proportion to the representation of the civilian labor force throughout the period 1965 to 1990 and promoted them on a non discriminatory basis, promoted them on the same basis as they promoted non blacks.

MR. MAY: We offer Defendant's 59.

THE COURT: Received subject to reconsideration after cross examination.

CROSS EXAMINATION

BY MR. FITZPATRICK:

Q. Good afternoon, Dr. Peterson.

A. Good afternoon, Mr. Fitzpatrick.

Q. I examined you by telephone but we had not met until today?

A. Nice to see you face to face.

Q. We've touched on this a short while ago but it's

* * *

[p. 157] THE COURT: Is it your opinion that, if anything, the use of the civilian labor market figures tends to under represent the percentage of blacks that would have been presumptively qualified for and interested in the position of firefighter but for some externality?

THE WITNESS: Estimating availabilities is inherently an imprecise business, Your Honor. And thinking of all of the different reasons why my estimate might be wrong, either too high or too low, I can think of more reasons why it is too low than why it is too high.

THE COURT: Additional examination?

THE COURT: All right. You may step down.

MR. MAY: Call Chief Donald Wear.

THE COURT: Why don't we go ahead and take about a fifteen minute recess before the next witness.

MR. ALEXANDER: If Your Honor, please, one matter before he goes. We have had Mr. Northrop, Dr. Peterson's associate available. If there's any challenge to the source data, I would like to know about it so they can have him testify. If not, I want to send him back to Durham.

MR. FITZPATRICK: The report is already in.

MR. ALEXANDER: I'm going to send him home.

(Brief Recess).

(Open Court)

* * *

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

* * *

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Civil Rights Act of 1964

Section 703 [42 U.S.C. § 2000e-2]:

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(2) (3)

Nos. 94-1397, 94-1422

Supreme Court, U.S.
FILED
MAR - 9 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

No. 94-1397

RICHARD ARRINGTON, JR., et al.,

Petitioners,

v.

ROBERT K. WILKS, et al.,

Respondents,

and

No. 94-1422

JOHN W. MARTIN, et al.,

Petitioners,

v.

ROBERT K. WILKS, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MEMORANDUM IN SUPPORT OF PETITIONS

LaVeeda Morgan Battle
Counsel of Record

Mark T. Waggoner
Gorham & Waldrep, P.C.
2101 6th Avenue North,
Suite 700
Birmingham, AL 35203
(205) 254-3216

Counsel for Respondent Personnel Board of Jefferson County, Alabama

March 9, 1995

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QUESTIONS PRESENTED FOR REVIEW

This is a response to the Petitions for Writ of Certiorari submitted pursuant to Supreme Court Rule 12.4. Since Respondent supports the position of the Petitioners, it adopts the questions presented for review as stated by Petitioners.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Kenneth O. Ware
Phillip H. Whitley
Marshall G. Whitson
Robert K. Wilks
David H. Woodall

Plaintiff-Intervenor

United States of America

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham
Joseph W. Curtin
James W. Curtin
Patricia Hoban-Moore
Jefferson County Personnel Board
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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Nos. 94-1397, 94-1422

In The

Supreme Court of the United States

October Term, 1994

No. 94-1397

RICHARD ARRINGTON, JR., et al.,

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JOHN W. MARTIN, et al.,

Petitioners,

v.

ROBERT K. WILKS, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MEMORANDUM IN SUPPORT OF PETITIONS

Respondent, Personnel Board of Jefferson County, Alabama, ("Personnel Board"), submits this memorandum in support of the Petitions for Writ of Certiorari filed

by Richard Arrington, Jr., City of Birmingham (City), John W. Martin, et al., (Petitioners) and pursuant to Supreme Court Rule 12.4 submit this Response to the Petitions. Supreme Court Rule 12.4 states in pertinent part:

> " . . . [A]ny respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that a response to the petition shall be filed within twenty days after its receipt . . . ".

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit at issue is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, *reh'g denied* (slip op.), *reh'g en banc denied*, ___ F.3d ___, 1994 WL 97742 (11th Cir. 1994). The opinion of the District Court is reported in *Bennett v. Arrington*, 806 F. Supp. 926 (N.D. Ala. 1992).

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1994. The Court of Appeals denied Petitioners' and Personnel Board's Petitions for Rehearing on November 25, 1994. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The constitutional provisions, statutes, and regulations involved are: The Fourteenth Amendment to the Constitution of the United States and Section 703 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2. U.S. Constitutional Amendment XIV, Section 1, the Equal Protection Clause, provides in pertinent part that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

> (a) It shall be unlawful employment practice for an employer
>
> (1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ; or
>
> (2) to . . . classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .
>
> .

42 U.S.C. § 2000e-2.

STATEMENT OF THE CASE

The Personnel Board adopts by reference the Statement of the Case submitted by the Petitioners. In

response to the petitions, the Personnel Board would supplement the statements of the case as follows.

This matter arose from the August 14, 1992, judgment of the trial court rejecting claims made by a group of male, non-black employees of the City of Birmingham alleging that the City, acting pursuant to a consent decree it entered in 1981 to resolve pending litigation, violated their rights under Title VII and the Equal Protection Clause. The plaintiffs alleged that promotion decisions made under the decrees were based solely upon the race of the person selected.

In the mid 1970's, four separate cases that brought actions against the City of Birmingham, the Personnel Board, Jefferson County, and other local government agencies alleging that their hiring and promotion practices were discriminatory against blacks and women, were consolidated. While the cases were pending, the parties undertook settlement negotiations. In June 1981, the plaintiffs entered into separate consent decrees with the City and the Personnel Board. On June 8, 1981, the District Court entered an order provisionally approving the consent decrees, pending public notice and an opportunity for public comment at a fairness hearing held August 3, 1981.

On July 14, 1981, non-black City employees filed a motion for leave to intervene in the proceeding and at the fairness hearing objected to the proposed decrees. The motion to intervene was denied as untimely by the District Court and the decrees were approved on August 18, 1981. Subsequently, other non-black male employees filed several suits claiming that the implementation of the

decrees constituted reverse discrimination, alleging they were passed over for promotions as a result of their implementation.

A trial of the consolidated reverse cases was held December 16-20, 1985. In that trial, the District Court granted the Personnel Board's motion for dismissal upon a finding that the plaintiff "[did] not establish . . . unlawful discrimination by the Board." (R21-1257).

The District Court further clarified its ruling at a status conference held on November 21, 1989. The Court reiterated the status of the Personnel Board as a nominal defendant present for the limited purposes of facilitating discovery of documentary evidence and cooperating in the implementation of any prospective injunctive relief which might be afforded to the plaintiffs. (R9-12-13).

The 1991 District Court proceeding and subsequent August 14, 1992, judgment from which these petitions emanate (*Bennett v. Arrington*, 806 F.Supp. 926 (N.D. Ala. 1992)) was a supplemental trial to the 1985 trial and the evidence submitted at the 1985 trial was still before the Court. (R12-13).

Accordingly, the individual plaintiffs and plaintiff-intervenors and the Personnel Board entered into a joint stipulation acknowledging the ruling by the District Court and accepting that determination as final and binding. The plaintiffs further waived any and all rights to challenge or appeal the ruling of November 21, 1989. The plaintiffs further agreed not to seek any monetary relief, including costs or attorney's fees from the Personnel Board in this action. The Personnel Board also agreed not

to seek any costs, attorney's fees or other relief from the plaintiffs. (R1-100).

Additionally, during the November 21, 1989, status conference, the District Court confirmed that the issue of testing and examination validity had been severed from consideration in this phase of the litigation. (R9-14). The time-table for achieving goals and testing validation is an issue in the companion "consent decree cases" (*Ensley Branch N.A.A.C.P. v. Siebels,* 31 F.3d 1548 (11th Cir. 1994)) but is not at issue here.

REASONS FOR GRANTING THE WRIT

Respondent adopts the reasons for granting the writ as stated by the Petitioners. The Respondent would supplement the reasons for granting the writ as stated by the Petitioners as follows.

I. The Eleventh Circuit erroneously concluded that the Personnel Board certifies separate lists of black and non-black eligible candidates.

In discussing the operation of the City decree, the Eleventh Circuit found that the Personnel Board certifies names on separate lists of black and non-black eligible candidates.

> "If the City indicates on the request for certification that blacks are needed to meet the requirements of the decree, the Board reviews the eligible register and provides the necessary number of names on separate lists of black and non-black eligible candidates. Black candidates

> and non-black candidates are listed separately in the order in which they are ranked on the eligible register."

In re Birmingham Reverse Discrimination Empl. Litig., 20 F.3d 1525, 1535 (11th Cir. 1994). This is an erroneous conclusion and is not supported in the record. The Personnel Board does not and has not provided lists of eligible candidates classified by race or any other classification. If it is obligated to supplement a list under its consent decree it provides one supplemented list of eligible candidates.

The Personnel Board Enabling Act (1945 Ala. Acts No. 248, as amended), governs the appointment of applicants to vacancies in the classified service. It specifies that after receiving a request for certification from an appointing authority, "[t]he Director shall thereupon certify to the appointing authority the names of the three ranking eligibles . . . when the vacancy for which the appointing authority has requested *a list* of eligibles . . . ." The Enabling Act speaks of *a* list, in the singular, for each request for certification.

Likewise, the Personnel Board Rules and Regulations address certification of eligible employees for vacancies in the classified service. Rule 4.5 governs compilation of a list of eligibles upon request by an appointing authority. In pertinent part it reads as follows:

> **"4.5 CERTIFICATION**
>
> Based on the receipt of an authorized requisition from an appointing authority, the Director shall certify and/or refer the name of eligibles from

the appropriate lists[1] in the following priority and manner:

(a) First, the one (1) name of the ranking former employee of the department for each vacancy from the layoff list, if any, shall be appointed.

(b) Second, the three (3) ranking names of former employees of other departments for each vacancy from the layoff list, if any, shall be used.

(c) Third, the three (3) ranking names of the employees of a department for a vacancy, if and only if they are the ranking eligible on the promotional list from the department in which the requisition originated, shall be used.

(d) Fourth, for each vacancy the three (3) ranking names of employees from other departments on the promotional list, if any, shall be used.

(e) Fifth, for each vacancy the three (3) ranking names of eligibles from the open competitive list, if any, shall be used.

(f) In general all entry level positions to be filled from open competitive lists shall be filled by the rule of three (3), with one additional name for each vacancy past the first vacancy. In the event that *a* requested

---

[1] The plural "lists" here should not be confused with the list of candidates certified to an appointing authority upon request for certification. Here, "lists" refers to eligible registers from which the list of qualified candidates is certified to the appointing authority.

> *list* of eligible[s] is for a department head position, the Director shall certify to the appointing authority the names of six (6) eligibles unless the appointing authority shall request only the names of the three (3) ranking eligibles. If the requested *list* of eligible[s] is for the entry level position of police officer, deputy sheriff, or firefighter, then the appointing authority may elect to request the certification of the names of five (5) different eligibles for each vacancy. If the appointing authority elects to request the certification of the names of five (5) different eligibles, he shall notify the Board of such election in writing by the same methodology used to request the certification of eligibles for other vacancies as set out in these rules.
>
> (g) . . . " (emphasis added)

Thus, there is no provision in the Personnel Board Enabling Act or certification rule authorizing multiple certification lists.

Furthermore, the Personnel Board consent decree established no requirements for certification on separate lists of black and non-black eligible candidates. The decree sets annual goals of certifying black and female applicants to each of the jurisdictions served by the Board, subject to the availability of black and female applicants. (85-PX-5, Section IV). The decree also establishes as a means of ensuring that sufficient numbers of blacks and women are certified to meet the decrees' goals that "the Personnel Board may certify at least three eligibles for any job vacancy in the classified service and, where necessary to meet such goals, may expand further

the number of eligibles certified for a particular job vacancy." (85-PX-5, ¶ 34). The consent decree itself establishes no practice or procedure of providing separate lists of black and non-black eligible candidates for certifications for job vacancies. It allows for *supplementation* of eligible candidates to attempt to achieve the decrees' goals.

The erroneous assumption made by the Eleventh Circuit would prove unworkable for all practical purposes. The Personnel Board develops one list for each vacancy. The separate list scenario assumes that there are no black eligibles in the top three to be certified. Needless to say, there are often black eligibles certified without supplementation.

The Eleventh Circuit cited paragraphs 17 and 27 of *In re Birmingham Reverse Discrimination Employment Litig.*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985), *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989), as the source of the information concerning separate lists of black and non-black eligible candidates. Nothing in those paragraphs mentions or refers to "separate lists." In fact, paragraph 27 indicates that the City receives "*a* certification of the names of individuals eligible for a promotion." (emphasis added). Paragraph 27 further states: "[s]ince the entry of the City decree, when the City indicates on its request for certification that its promotional goals have not been met, the Board certifies ranking individuals pursuant to the rule of three, *plus* the names of a sufficient number of black individuals to enable the City to meet its City decree goals." *Id.* at 1437-38, 27 (emphasis added). There is no reference to separate lists but only to the *supplementation*

of a sufficient number of black individuals to enable the City to meet its goals.

The consent decree acknowledges that the decision to employ persons certified by the Personnel Board is left to the sole discretion of the appointing authority of each jurisdiction. (85-PX-5, ¶ 23). For this reason, the Personnel Board supplements its certification lists with sufficient names of black eligible candidates to enable the City to meet its goals under the decree.

CONCLUSION

For the reasons stated by the Petitioners and supplemented herein, this Respondent respectfully supports the Petitioners' requests to this Court to grant *certiorari* to review the decision of the Eleventh Circuit.

March 9, 1995

Respectfully submitted,

LaVeeda Morgan Battle
Counsel of Record

Mark T. Waggoner
Gorham & Waldrep, P.C.
2101 6th Avenue North,
Suite 700
Birmingham, AL 35203

Counsel for Respondent
Personnel Board of
Jefferson County, Alabama

(3) (4)

Nos. 94-1397 & 94-1422

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD ARRINGTON, JR., *et al.*,

Petitioners,

vs.

ROBERT K. WILKS, *et al.*,

Respondents.

JOHN W. MARTIN, *et al.*,

Petitioners,

vs.

ROBERT K. WILKS, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

RAYMOND P. FITZPATRICK, JR.
Counsel of Record for Respondents
Robert K. Wilks, et al.
Sixth Floor, Farley Building
1929 Third Avenue North
Birmingham, Alabama 35203
(205) 320-0555

37 pp

Question Presented

Whether an affirmative action program embodied in a consent decree that, as implemented by a municipal employer, arbitrarily sets aside 50% of all promotional opportunities for blacks when blacks comprise some 10% of the qualified labor pool and fails to permit all qualified candidates to compete for all openings and have their relative qualifications considered unnecessarily trammels in violation of Title VII and is overbroad in violation of the Constitution.

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Nos. 94-1397 & 94-1422

IN THE

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ON PETITIONS FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Plaintiffs-respondents Robert K. Wilks, et al. are fifteen individual white male employees of the City of Birmingham Fire & Rescue Service ("BFRS") and one white male employee of the City of Birmingham Engineering Department.[1] Each would have been promoted to a position as a Fire Lieutenant, Fire Captain or Civil Engineer but for the race conscious conduct of the City of Birmingham ("City"). The respondents filed individual suits against the City, Mayor Richard Arrington, Jr., and the Personnel Board of Jefferson County ("Board") under Title VII and the Equal Protection Clause. The defense to these suits was premised upon a claim of compliance with consent decrees entered in litigation to which respondents were not parties. The Eleventh Circuit Court of Appeals correctly held that the City's race-conscious actions violated Title VII and the Constitution.

Opinions Below

Respondents adopt the statement of opinions of the lower courts of petitioners Arrington and City of Birmingham. City Pet. 2.

Jurisdiction

Respondents adopt the statements of jurisdiction of the petitioners. City Pet. 2; Martin Pet. 2.

Statutes Involved

Respondents adopt the statement of Constitutional Provisions And Statutes Involved of petitioners Arrington and City of Birmingham. City Pet. 2; City App. 269a-270a.

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[1] In addition, an association of employees of the City is a plaintiff respondent.

Statement of the Case

A. Proceedings Leading to the Consent Decrees.

During 1974 and 1975, racial discrimination suits were filed by the United States, the Ensley Branch of of the NAACP, and a class of black persons led by petitioner-plaintiff John W. Martin. *United States v. Jefferson County, et al.*, CV-74-P-666-S and consolidated cases (N.D. Ala.). The complaints charged that the City of Birmingham ("City"), the Personnel Board of Jefferson County (the "Board"), Jefferson County and numerous other municipalities under the jurisdiction of the Board had engaged in employment practices resulting in unlawful discrimination against blacks and women in violation of Title VII of the Civil Rights Act of 1964, other federal statues and the Equal Protection Clause. The district court severed the issues for separate trials.

The 1976 trial addressed whether the Board's use of entry level Office Worker, Firefighter, and Police Officer examinations unlawfully discriminated against blacks. On January 10, 1977, the district court found that the Board's use of the Firefighter and Police Officer tests violated the Title VII rights of blacks. No violation of law was found in the use of the Office Worker test. Citing the good faith voluntary efforts of the Board to administer non-discriminatory tests and affirmatively recruit blacks for public employment, the district court rejected the claims of the United States and other plaintiffs under the Equal Protection Clause. The claim that the tests discriminated against women was dropped. As a remedial device, the district court ordered the Board to comply with a short term referral quota of blacks and thereafter achieve a goal of referral of blacks for entry level Firefighter and Police Officer positions based on applicant flow. No relief was ordered against the City. The district court's order, in relevant part, was upheld on appeal. *Ensley Branch of the NAACP v.*

Seibels, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

Following entry of the 1977 Order, many blacks were referred by the Board to the City and hired as firefighters. By the time of entry of the 1981 Decree, the City had hired 52 black firefighters. App. 248a.[2] After 1976, blacks were hired as firefighters at rates in excess of expectations based on availability in the labor pool. App. 46a, 255a.

A second trial was held in August and October 1979. At issue were eighteen additional tests and various other screening devices and rules used by the Board. BFRS promotional examinations were not among those challenged. 1985-DX-1428, 1429. As in the first trial, the City did not participate and any independent claims against the City were never tried.

Prior to the court's decision in the second trial, and following the election of Mayor Richard Arrington, Jr., counsel for the original parties (the City, Board, United States, and Martin plaintiffs) engaged in lengthy, secret negotiations which resulted in comprehensive consent decrees between the plaintiffs and the City and the Board. App. 109a (hereinafter "City Decree") and App. 203a (hereinafter "Personnel Board Decree").

In the process of the negotiation of the City Decree, the City continuously pressed for high fixed quotas with little monetary cost while the government urged goals based on twice the black representation in the applicable pool. App. 6a-9a. The City Council made no findings of past discrimination

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[2] Respondents will use the same format for citation of the trial court record and exhibits as used by the petitioners. See Martin Pet. at 2, n.1. References to the appendix to the City Petition, no. 94-1397, will be to App. XXa; the appendix to the Martin Petition, no. 94-1422, is referenced as AXX.

and paid little attention to the goal provisions of the Decree. Their primary concerns were cost and politics. 1991-PX-11 (pp. 217-234); 1991-PX-13; 1991-PX-14. Following approval of the Decree by the Birmingham City Council, the City's attorneys continued negotiations and then agreed to a 50% annual goal for the promotion of blacks to Fire Lieutenant jobs. App. 10a. The Decree had no termination date. App. 11a. The evidence was without dispute that racial politics played a significant role in the City's approval of the Decree.[3]

The two decrees were tendered to the district court and provisional approval was summarily entered on June 8, 1981. There was no actual notice of the pendency of the Decrees made to nonminority City employers sufficient to bind their interests. *Martin v. Wilks*, 490 U.S. 755 (1989). The Birmingham Fire Fighters Association appeared at a fairness hearing held on August 3, 1981 and objected to the proposed decrees. On August 4, 1981, it moved to intervene as of right under Rule 24, F.R.Civ.P.[4]

The district court entered an Order approving the two consent decrees on August 18, 1981. A106. The court's accompanying Opinion rejected all objections to the decrees and approved the settlement under a "reasonableness" standard.[5]

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[3] Councilman Clifford testified: "Whether it's stated or implied, [race] is always an issue." 1991-PX-14 (p. 36).

[4] The district court's statement that intervention was sought on August 19, 1981 is a mistake. City App. 72a.

[5] The approval of the Decrees was never reviewed by the Court of Appeals because the Eleventh Circuit dismissed the appeal from the denial of intervention. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). The statement of the Martin petitioners that approval of the City Decree was affirmed by the Eleventh Circuit is wrong. Martin Pet. 2.

The "reasonableness" standard was sharply criticized as having "no support in the decisions of this Court" in *Wygant v. Jackson Bd. of Ed.*,

(Footnote continued)

A117. The district court found the motion to intervene untimely since "the litigation has been pending for over five years and has been vigorously contested by the existing parties through two trials and one appeal." A117.

B. The Consent Decrees.

The City Decree required the achievement of a long term goal of "the employment of blacks and women in each job classification in each department of the City of Birmingham in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the [1980] Federal Census." Hence, the City's goal was to employ blacks in 28% of all positions in each separate job classification and women in 43% of all positions in each separate job classification. App. 90a. The Decree also required the City to achieve annual goals for appointment of blacks to some 100 of the 500 job classifications at rates from 25% to 50% or the percentage of black representation in the applicant group, whichever was higher. *Id.* For example, the City was thereby required to award 50% of Fire Lieutenant promotions and 50% of Police Sergeant promotions to blacks until achievement of the long term goal (28%) for blacks in each of those jobs. App. 90a, 91a, 114a-119a.

The Personnel Board Decree required the Board to utilize "selection standards or procedures which the Board can demonstrate either have no adverse impact or have been validated in accordance with the *Uniform Guidelines*." App. 207a. The Board Decree further authorized the Board to make efforts toward "revisions in scoring and ranking procedures which may be followed which will reduce or eliminate any adverse impact on blacks or women and which would continue to

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476 U.S. 267, 279 (1986) (plurality); *see also, Aikens v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994).

provide a sufficient pool of qualified candidates for certification and selection in accord with the goals of this Decree." App. 207a-208a. The Board Decree required that the Board ensure that blacks or women were certified for consideration for certain jobs at specified percentage rates and, in all respects, that the Board certify sufficient numbers of additional blacks and women as necessary to allow the City to meet the goals for appointment of blacks and women specified in the City Decree. App. 224a-225a.[6]

C. Post Consent Decree Proceedings.

On appeal by the Firefighters Association from the denial of its 1981 motion to intervene, the Eleventh Circuit found that the district court did not abuse its discretion by denying intervention to the nonminority employees in the consent decree proceedings. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). The appeals court determined that the firefighters would suffer no prejudice by a denial of intervention since individual fire fighters were free to "institute an independent Title VII suit asserting the specific violations of their rights." Hence, the Eleventh Circuit did not then address the validity of the Decree.

Numerous independent Title VII/Equal Protection claims were filed by white male employees of the City of Birmingham.

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[6] Under the state law "Rule of Three", the Board certified the top three persons in the Register for a job opening. The City then appoints from the certified list of three. Under the Board Decree, it must also separately certify the highest ranking black or female on the Register -- no matter how far down the list. The record developed in 1985 demonstrated that the City and Board had to jump over some 80 qualified whites in order to certify and promote some black employees. During the period relevant to this case, the Personnel Board always certified two lists based on race for the jobs at issue. Those lists are in evidence. The Personnel Board's claim that the Eleventh Circuit's finding in this regard is wrong is blatantly false. Personnel Board Br. at 6,7.

Those complaints challenged actions taken by the City of Birmingham and the Personnel Board in race and gender-based employment practices which the City and Board contended were required or permitted by the consent decrees entered in this case. The various complaints were eventually consolidated before District Judge Pointer under the master caption file *In re: Birmingham Reverse Discrimination Employment Litigation*, CV 84-P-903-S, hereinafter "BRDEL". R2-1 (April 12, 1984).

In December 1985, Judge Pointer tried the claims of the first fifteen white male employees of the BFRS or Engineering Department that filed complaints in *BRDEL*. The district court had previously determined that the white male employees could not challenge actions required or permitted by the Decrees. R2-54, 55. The trial therefore focused on the City's conduct in implementing the City Decree and whether its actions were outside the limitations of City Decree paragraph 2.[7] The Court agreed that but for the race conscious decisions challenged here each plaintiff would have been promoted. A69. Finding that the plaintiffs had failed to demonstrate that the City and Board were acting in violation of the consent decrees, the court entered judgment for the defendants.[8] The

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[7] Paragraph 2 provides, in relevant part, that "nothing herein shall be interpreted as requiring the City to . . . promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." App. 112a.

[8] The initial opinion of the district court was delivered from the bench on December 20, 1985. A65-105; *BRDEL*, 39 FEP Cases (BNA) 1431 (N.D.Ala. 1985). Those findings were modified and supplemented following Rule 59 motions. See, R5-275, 276. Respondents challenged the findings that the challenged promotions were taken pursuant to the Decree in the first appeal, but the Court of Appeals never reached them because it reversed and ordered a new trial on the primary issue of preclusion. See, *BRDEL*, 833 F.2d 1492 (11th Cir. 1987), Brief of Appellants Wilks, et al., case no. 86-7108 (pp. 70-71) and Brief of the United States. The notion

(Footnote continued)

Eleventh Circuit reversed and this Court upheld the judgment of the Eleventh Circuit. *In re: Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom., Martin v. Wilks*, 490 U.S. 755 (1989).

This Court found that it was incorrect to bind the white male plaintiffs, as nonparties, to the provisions of the decrees. Rather, plaintiffs remained free to challenge actions taken pursuant to the decrees as violative of their rights under Title VII or the Fourteenth Amendment. 490 U.S. 755, 769. The Eleventh Circuit also directed the district court on remand to apply heightened scrutiny to the City Decree:

> The City Decree does contain a provision -- paragraph 2 -- that facially serves to protect the interests of nonminority employees. In light of the district court's interpretation of paragraph 2, however, that protection is illusory at best. The district court's interpretation of the City Decree permits the City to make race conscious promotions without using any job-related selection procedure. Given the natural potential that such an arrangement will trammel the interests of nonminority employees, we are compelled to the conclusion that the district court should subject the consent decrees to heightened scrutiny under the second prong of the *Johnson* analysis when it tries the individual plaintiffs' claims.

BRDEL, 833 F.2d at 1501.

Following the 1989 decision of this Court, the district court articulated a view that prospective relief in *BRDEL* should be governed by modification proceedings in the original consent

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that *all* of the district court's 1985 findings are undisturbed or are law of the case is wrong. See Martin Pet. at 7, 9 n.8. Each of the district court's decisions has been reversed in relevant part.

decree case. The district court further noted that the law is now clear that it is advantageous to have all interested parties before the court in the consent decree proceedings and thereby invited the non-black male employees to participate in the consent decree litigation.

D. The Modification Proceedings.

On March 29, 1990, the plaintiffs in *BRDEL*, Robert K. Wilks, et al., filed a motion to intervene in the consent decree cases and consolidate the two matters for further proceedings. R1-54. The district court granted intervention but denied consolidation. R1-77. The United States and the Wilks plaintiff-intervenors then moved the court to modify the decrees.

On May 21, 1991, the district court entered an Order and Opinion which acknowledged that the goal provisions of the 1981 Decree would not pass muster under current caselaw and modified the goals to some extent. App. 84a, 102a. Dissatisfied with the limited extent of the court's modifications, the Wilks plaintiffs and United States appealed. The Eleventh Circuit reversed the district court's decision and provided detailed instructions for the district court to vacate the goals of the Decree and construct a new valid remedial plan, to the extent one is still necessary. *See, Ensley Branch v. Seibels*, 31 F.3d 1548 (11th Cir. 1994). No party sought review of that decision by this Court.

E. The 1991 Trial and Decision of the District Court.

On October 21, 1991, the district court held a supplemental trial on plaintiffs' reverse discrimination claims. The evidence submitted at the 1985 trial was still before the district court and there was no need to repeat the presentation of that evidence. R12-13. Additional oral and documentary evidence was submitted. Plaintiffs submitted extensive evidence demonstrating the process by which the affirmative action

plan as embodied in the 1981 City Decree was negotiated and constructed.

On August 4, 1992, the district court entered its Order and Final Judgment dismissing the claims of the fifteen employees whose claims were tried at the 1985 and 1991 trials. App. 69a. In its Opinion, App. 71a, the court found that the race-based relief incorporated into the 1981 Decrees was permissible under both Title VII and the Constitution. The district court held that the City had met its burden of proving that its adherence to the decree was a valid defense. First, the district court rejected plaintiffs' contention that the City must make findings of past discrimination in order to justify its adoption of a race-conscious plan and, rather, adopted the view that "the issue is whether at the time it agreed to the consent decree the City had a strong basis in evidence for believing that there had been discrimination against blacks (and women)." App. 76a, n.4. In support of the decrees, the district court cited: (1) its 1976 finding that the entry level tests for the Fire and Police Departments violated Title VII; (2) "the discriminatory restrictions on these entry level positions meant, of course, that blacks had been denied the opportunity to hold higher level positions in these departments;" and (3) that other evidence was submitted in 1979 "attacking scores of other tests and selection devices administered by the Personnel Board . . ." App. 77a-78a. On that basis the district court found that the first prong of the analyses required by *Johnson* (Title VII) and *Croson* (Equal Protection) had been satisfied. App. 76a.

The district court characterized *Croson's* second prong -- narrow tailoring -- as a "closer question." App. 78a. The court found that the City Decree satisfied considerations of flexibility and duration because it did not require the hiring of unqualified persons. The court described the Decree as "requiring" the reflexive promotion of blacks on a one-for-one basis:

> Instead, [the Decree] requires that, when both black and white firefighters are certified to the Fire Department as qualified applicants for a promotion, the Department will alternate between blacks and whites, selecting the white or black applicant who is ranked highest according to the Board's ranking procedure.

App. 79a-80a. The court also found the Decree sufficiently narrowly tailored because it seeks a long term goal of achievement of a work force mirroring the representation of blacks and women in the Jefferson County labor force based on 1980 federal census data.[9] The district court noted that the interim goals for promotion to Fire Captain and Fire Battalion Chief were appropriate because they "were tied to black representation within [the Fire] Department, albeit accelerated by the original interim goal to twice the representation of blacks in the Department. App. 82a. Surprisingly, the district court made no mention of the 50% annual goal for promotions to Fire Lieutenant and the basis on which it implicitly found the goal to be valid. *Id.* That goal has been the focal point of this litigation. Finally, the court found the burden on the plaintiffs was "acceptable" because there "were no provisions to use layoffs as a means for favoring junior black employees over more senior white employees, nor was there an absolute bar to promotions for white Department members, since half of the promotions would be whites." App. 83a. No mention was made of the justification for the Engineering Department goal.

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[9] The suggestion by the petitioners that they could have chosen the larger black population of the City of Birmingham proper as the relevant labor pool is a recent fabrication. City Pet. 7, n.3; Martin Pet. 13. The evidence submitted by the City's own expert did not use the City of Birmingham civilian labor force as the relevant labor pool. App. 252a-256a.

F. The Decision of the Eleventh Circuit.

On appeal by the Wilks plaintiffs, the Eleventh Circuit reversed with instructions to provide a remedy to the plaintiffs. App. 54a.

Employing the district court's 1985 findings of fact, the Court of Appeals confirmed that the City promotes from two separate lists of black and non-black candidates, never compares the relative qualifications of competing candidates for promotion and simply promoted in rank order with "alternate selections between the top name on the black list and the top name on the non-black list until the available openings are filled." App. 18a. Hence, the Eleventh Circuit noted, "employees who will eventually fill an opening in the BFRS are pre-selected by race." App. 19a. The appeals court found:

> Among employees certified by the Board as eligible candidates, promotions are awarded solely by race. No black employee ever competes for the two openings designated in advance to be filled by non-blacks. No non-black employee can compete for the two openings designated for blacks.

App. 20a.

Unlike the district court, the Eleventh Circuit separately evaluated the claims of the Wilks respondents under Title VII and the Equal Protection Clause. App. 15a, 20a. The appeals court evaluated the Title VII claim under the standard of *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) and the constitutional claim under the standard of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The appeals court upheld the district court's finding that the "City had strong evidence before it to believe it had engaged in past racial discrimination when it entered the consent decree," App. 31a, 32a, and therefore satisfied the first prong of

the *Johnson* analysis. Considering the second prong of the *Johnson* test -- unnecessary trammeling of the interests of nonminorities -- the Eleventh Circuit found that the City's use of race as the "sole factor" in making promotions from "separate lists to fill openings allocated by race" was the very sort of racial quota plan cautioned against by this Court in *Johnson*. App. 33a. Finding the 50% annual promotional quota "arbitrarily-selected" and "unduly restricting the promotional opportunities" of non-black firefighters when blacks represented only 9% of the pool of possibly-qualified applicants for promotion to a job requiring special training and qualifications, the Eleventh Circuit found the City unnecessarily trammeled the rights of the respondents. App. 36a, 37a. The court determined that trammeling was clear due to the fact that -- unlike a case involving a valid hiring goal -- this case involves a promotional quota where a small group of nonminority promotional applicants had to shoulder the entire burden of a remedy that bore no reasonable relationship to the representation of blacks among firefighters qualified for promotion. App. 37a-39a.

The Eleventh Circuit also found the City in violation of the Equal Protection Clause of the Fourteenth Amendment under the standards of analysis provided in *Croson* and *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986). The appeals court found "the City had a compelling interest in providing a remedy for its prior discriminatory employment practices,[10]

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[10] Respondents continue to maintain, as they did in the lower courts, that the City lacked a sufficient compelling governmental interest grounded in either actual findings of past discrimination or an adequate record of past discrimination to justify a race-based remedy for *each* job classification in *each* department of the City's employment structure -- and particularly with respect to the Fire Lieutenant, Fire Captain and Civil Engineer jobs at issue in these challenges. The Eleventh Circuit erroneously equated the requirements of past discrimination with the manifest imbalance test of

(Footnote continued)

but that the City's use of race in its affirmative action plan was not narrowly tailored to achieve that interest as required under the Equal Protection Clause." App. 41a. The appeals court noted that the Decree was not intended to provide relief to identified victims of past discrimination, there was no sufficient consideration of race-neutral alternatives, and pre-decree efforts of the City to increase black representation in the BFRS with limited referral goals from the Board were "encouraging not ineffective" as found by the district court. App. 44a-46a. Moreover, the City made no effort to consider less onerous racial solutions, such as a plan like that approved in *Johnson*, than the strict quota eventually implemented by the City. App. 47a. Rather than providing a "proper remedy for past discrimination," the Eleventh Circuit found that the City's imposition of a "50% annual quota for promotions of blacks" was "designed to achieve the unconstitutional objective of outright racial balancing." App. 49a. Such a "rigid approach, while administratively convenient, is not a narrowly tailored means to remedy prior discrimination" and is ". . . instead an approach designed to achieve government-mandated racial balancing - the perpetuation of discrimination by government." App. 51a. The appeals court found the 50% goal for promotion to Fire Lieutenant bore no relationship to the relevant labor market of blacks within the ranks of trained firefighters. App. 51a, 52a. Finally, the court found the Decree's impact on the Wilks plaintiffs excessive due to the open duration of the decree and the elimination of half of all promotional opportunities for nonblacks on the sole basis of their race. App. 52a, 53a.

Title VII. App. 42a. Respondents contend that the City's plan does not pass muster under either prong of the *Croson* or *Johnson* analyses.

SUMMARY OF THE ARGUMENT

In a painstakingly thorough opinion, the Court of Appeals for the Eleventh Circuit found that the City of Birmingham engaged in race-conscious actions that clearly violate the permissible limits of lawful affirmative action under this Court's precedents. The petitions of the City of Birmingham and those representing the interests of black employees should be denied.

The Eleventh Circuit's finding that the City's inflexible one-for-one promotional quota program is unlawful is entirely consistent with *Croson, Paradise, Wygant, Johnson, Weber* and the decisions of other Courts of Appeals dealing with similar issues. Moreover, the Eleventh Circuit's decision strictly scrutinizing Birmingham's conduct is consistent with the current national agenda to take a hard look at affirmative action to ensure against abuses.

The City of Birmingham's complaint that it has been forced to endure a twenty year gauntlet of employment litigation, City Pet. 17-18, ignores the fact that Birmingham is in a dilemma of its own making. The City has steadfastly defended its right to engage in a strict program of quotas throughout this litigation and sought to blame everyone -- the Department of Justice, the Personnel Board, the white employees and the courts -- for its problems. The truth is that the City's quota program is consistent with the racial-political agenda of those in power in City government.

Respondents have endured a fourteen year battle to assert their right to fair and nondiscriminatory treatment by their employer. While the issue of valid affirmative action is an important one, respondents urge this Court to deny certiorari so they may now obtain their long-denied remedy.

ARGUMENT

I. The Eleventh Circuit's Decision Is Consistent With Current Precedent Governing Valid Affirmative Action.

A. *Croson* Provides The Standard For Constitutional Scrutiny of the City's Conduct.

Seeking to avoid the rules governing voluntary race-based affirmative action announced in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the City contends that *Croson* is of little relevance in evaluating race-based action taken pursuant to a consent decree. Rather, petitioners rely on *Weber* (a Title VII case), the plurality opinion in *Paradise*, and *Sheet Metal Workers* (court-ordered remedy for an egregious continuing Title VII violation).[11] City Pet. 8, 9; Martin Pet. 10-13.

It is well-settled that this Court's decision in *Croson* represented a landmark decision settling the standard for evaluation of voluntary race-conscious efforts. Municipal remedial race-based conduct should be subjected to strict and searching scrutiny. *Croson*, 488 U.S. at 494. That standard and the *Croson* analysis apply to employment cases as well as cases involving programs to encourage minority participation in public contracts. 488 U.S. 501.[12]

The City petitioners seek recognition of different -- but undefined -- standard for voluntary race-based conduct taken pursuant to an employment consent decree. City Pet. 8. In

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[11] *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *United States v. Paradise*, 480 U.S. 149 (1987) (plurality op.); and *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 221 (1986) (plurality in relevant part).

[12] *Croson* has been uniformly applied to cases involving race-based voluntary action by a state actor. *See Podbesesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (receipt of state scholarship aid).

BRDEL, 833 F.2d 1492 (11th Cir. 1987), *affirmed*, 490 U.S. 755 (1989), now law of the case, the Eleventh Circuit confirmed that the City's conduct was voluntary race-based action to be evaluated under the standards applicable to a purely voluntary affirmative action plan. See also, *Local 93, Firefighters v. City of Cleveland*, 478 U.S. 501, 517 (1987) ("there does not seem to be any reason to distinguish between voluntary action taken in a consent decree and voluntary action taken entirely outside the context of litigation"). The law is settled that there is no basis for creating a different rule for affirmative action embodied in a consent decree. Nor do the defendants suggest any policy reasons for a different standard.

Every Court of Appeals that has evaluated race-based affirmative action by a public employer has recognized that the rules of *Croson* govern the issue of constitutional validity. *See, Stuart v. Roache*, 951 F.2d 446, 449-50 (1st Cir. 1991) (Breyer, Ch. J) (evaluating decree under *Croson* strict scrutiny standard); *Hayes v. North State Law Enforcement Officer Association*, 10 F.3d 207 (4th Cir. 1993); *Edwards v. City of Houston*, 37 F.3d 1097, 1112 (5th Cir. 1994); *United Black Firefighters Association v. City of Akron*, 976 F.2d 999, 1008 (6th Cir. 1992) ("Croson does not exempt consent decrees from its requirements."); *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993) (en banc, Posner, J.), *cert. denied*, 114 S. Ct. 290; *Davis v. San Francisco*, 890 F.2d 1438 (9th Cir. 1989); *Cunico v. Pueblo School District*, 917 F.2d 431 (10th Cir. 1990); *Peightal v. Metro Dade County*, 940 F.2d 1394 (11th Cir. 1991). Nevertheless, the City of Birmingham contends *Croson* does not apply, while the Martin petitioners simply ignore *Croson's* existence. Their argument that *Croson* does not apply when evaluating race-based conduct of a public employer taken pursuant to a consent decree is meritless and not worthy of review by this Court.

B. The Eleventh Circuit's Decision Does Not Conflict With This Court's Precedents.

Respondents rely heavily upon the *Paradise* plurality opinion, *Sheet Metal Workers* and *Weber* in urging this Court to grant review. They effectively claim that the approval of race-based set asides in those cases mandate approval of all racial set asides. None of those cases involved voluntary action by a municipal employer. *Paradise* and *Sheet Metal Workers* involved judicially-crafted remedial plans imposed upon recalcitrant defendants. *Weber* involved an entry-level training program adopted by a private employer.

In *Paradise*, the plurality opinion relied upon by petitioners described a twelve year history of violation after violation of court orders and consent decrees by the Alabama Department of Public Safety in developing fair and nondiscriminatory selection procedures to remedy an egregious constitutional violation. 480 U.S. 167-73. Only after the State of Alabama failed to honor several deadlines it has previously agreed to for the development of fair tests, and faced with the State's claim of an urgent need to promote sixteen troopers to corporal, did the district court order the State to reserve 50% of the promotional positions for blacks *until such time as a nondiscriminatory selection procedure was in place*. 480 U.S. 178. The district court's order had the desired coercive effect of forcing the Department of Public Safety into prompt compliance with federal law when it promptly adopted fair selection procedures immediately after the first round of promotions thereby nullifying the racial remedy in short order. 480 U.S. 179. In *Paradise*, the district court's efforts to use less intrusive remedies were ineffective in the face of official obstruction by the State of Alabama.[13] Here, the case is the

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[13] The Eleventh Circuit recognized this factor is distinguishing *Paradise*:

(Footnote continued)

exact opposite. Birmingham desires to promote in a strictly racial fashion and has no interest in the development of race-neutral selection procedures.

Sheet Metal Workers, a Title VII case, involved a recalcitrant New York City construction union that for many years had repeatedly violated court orders to open its membership to blacks.[14] Only after exhausting more limited remedies did the district court set a 29% nonwhite membership goal based on the percentage of nonwhites in the relevant labor pool. There is nothing in *Sheet Metal Workers* that conflicts with the Eleventh Circuit's decision here.

Finally, *Weber* was a Title VII case involving a training program for entry level jobs in a private plant in Louisiana. The approval of a goal for admission to a training program for unskilled laborers in a private-sector Louisiana plant can hardly dictate the result of the Constitutional analysis of a hard 50% quota for promotions of Fire Lieutenants by the City of Birmingham. Moreover, some have suggested that *Weber* may be due to be reconsidered and overruled. *Johnson*, 480 U.S. 657 (White, J.) and 670 (Rehnquist, Ch.J., and Scalia, J.). Respondents believe the *Weber* analysis has been abused and is not limited to remedying manifest imbalances

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> This, however, is not a case like *Paradise*, where the district court ordered a remedy to combat on egregious refusal to follow its prior orders to end discriminatory practices. This is a case where, to end pending litigation, the City voluntarily entered into a consent decree containing a quota-based affirmative action plan that cannot withstand scrutiny.

App. 39a.

[14] Petitioners fail to point out that the portions of the *Sheet Metal Workers* opinion they rely upon (Parts IV and V of Justice Brennan's opinion and a portion of Justice Powell's separate opinion) failed to command a majority of the Court.

in traditionally segregated job categories but has been a vehicle for racial- and gender-balancing by public and private employers interested in social goals of diversity. *Id.* If review is granted, *Weber* should be reconsidered and overruled.

The notion that *Paradise, Sheet Metal Workers* or *Weber* should dictate the result in this case is wrong. The Eleventh Circuit carefully considered the various factors identified in those cases, as well as *Johnson, Wygant* and *Croson,* in evaluating the City's conduct and determined that the City's actions violated Title VII and the Constitution. The fact that the Eleventh Circuit reached a different result when it evaluated the unique facts of this case does not mean that its decision conflicts with this Court's precedents.

C. The Eleventh Circuit's Decision Is Not In Conflict With Other Circuits.

The City of Birmingham's argument that the decision of the Eleventh Circuit is in conflict with recent decisions of the Fifth and Sixth Circuits is also meritless. City Pet. 14.

The City claims that the court in *Aikens v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994), "upheld a provision of a decree which actually mandated that, without regard to the percentages of blacks at the entry level positions, the Memphis fire department must reserve at least twenty percent of the annual promotions for blacks. . ." City Pet. 15. That is not accurate. First, the court carefully determined that during the relevant period when promotions to police sergeant were made, 32.4% of the persons in the lower rank were black; during the period when fire lieutenant promotions were made, 15.3% of the persons in the lower rank were black; during the period when promotions to fire investigator were made, 34.3% of the persons in the lower classification were black; and, during the period when fire battalion commander promotions were made, blacks constituted 20% of the persons in the lower ranks.

Under such circumstances, one can hardly dispute a 20% annual goal, assuming all other provisions of a valid plan are in place. Second, the Sixth Circuit found that there were unresolved issues of fact underlying the question of whether the goals of the Decree were narrowly tailored. The court reversed the grant of summary judgment for the defendant City and remanded for full trial of the plaintiffs' claims of unlawful reverse discrimination. The appeals court was concerned about the use of civilian labor force statistics as a long term goal for a promotional position requiring special skills: "there indeed is a possibility that the racial composition of the qualified labor pools for these positions will materially differ from that of the general Shelby County labor force." The Sixth Circuit's decision is not inconsistent with the Eleventh Circuit's evaluation of Birmingham's race-based conduct.

There is also no inconsistency here with the decision of the Fifth Circuit in *Edwards v. City of Houston*, 37 F.3d 1097 (5th Cir. 1994). That court evaluated a proposed consent decree under the standards of *Johnson* and *Croson* and found that it passed muster under both Title VII and the Equal Protection Clause. Unlike the situation in this case, the relief in *Edwards* was carefully crafted to the extent of proven discrimination in promotions to the particular job involved, was clearly linked to the relevant qualified labor pool, was limited in duration, and required the prompt institution of valid bias-free selection procedures. Moreover, the employer created additional positions, at its expense, to assist in the implementation of the remedial plan by eliminating any loss of expected promotions for nonminority employees. The Eleventh Circuit made contrary findings on each of those factors. There is no conflict in the law of the circuits to warrant review by this Court.

II. The Eleventh Circuit Correctly Found The City's Affirmative Action Plan Was Overbroad In Violation Of *Croson*.

Under the various decisions of this Court addressing remedial affirmative action, there are a number of factors to be evaluated in determining whether a plan is narrowly tailored. Using any of the factors identified in *Bakke, Wygant, Paradise* or *Croson*, it is clear that the Eleventh Circuit's ruling that this plan is not narrowly tailored is due to be upheld. Here, the Eleventh Circuit correctly recognized that the 50% quota was arbitrarily chosen and bore no relationship to the representation of blacks in the pool of persons arguably qualified to be promoted to Fire Lieutenant.

"Under strict scrutiny the means chosen to accommodate the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant*, 476 U.S. at 280; *Fullilove v. Klutznik*, 448 U.S. 448, 480 (1980). The classification should fit "with greater precision than any available alternative." *Wygant*, at 280 n.7. Courts should ". . . give particularly intense scrutiny to whether a nonracial approach or a more narrowly tailored racial classification could promote the substantial interest about as well . . . ." *Wygant*, at 280 n.6.

The Eleventh Circuit found that no effort was made to develop a nonracial remedy or even a less-intrusive racial plan. App. 44a-46a. The *Croson* Court noted the failure of the Richmond City Council to consider race-neutral means to increase minority participation. Recognizing that the alleged barriers to blacks were race-neutral, this Court suggested that ending such barriers would lead to increased minority participation in contracts. 488 U.S. 507. Rather than eliminate barriers, the City of Birmingham opted for the

administratively simple tool of across-the-board racial quotas for all City job classifications.[15]

The Eleventh Circuit recognized and the City freely admitted that it never considered any alternative remedies. App. 47a; 1991-PX-1, response 6. Nor did the City look beyond the goal of racial balancing based on black representation in the local population. "It rests upon the 'completely unrealistic assumption' that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, at 507. The City Decree was adopted in summary fashion with no consideration given to the individual components of the plan and the extent of their necessity in the various departments and levels of City government. App. 6a-9a. There were no realistic efforts to identify or redress whatever discrimination existed in the BFRS promotional process or the Engineering Department's promotional process.

The Eleventh Circuit correctly recognized that less intrusive remedies were available. These include elimination of points for seniority or implementation of new testing procedures. App. 46a-47a. The City gave no consideration to such alternatives. Race-neutral relief is realistic and should be the rule rather than the exception. If the elimination of any barriers to the promotional opportunities of blacks does not remedy a perceived violation, then an employer might consider stronger measures. Other less intrusive remedies could have

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[15] The recent decision of the Eleventh Circuit in the parallel modification proceedings makes clear that the day has come for Birmingham and the Personnel board to stop making administratively-convenient race-based employment decisions and move to implement fair and nondiscriminatory selection procedures with all deliberate speed. *See, Ensley Branch v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

included wide-band certifications,[16] referral goals, or other devices designed to increase the numbers of certified blacks. At that point Birmingham still could have selected in a non-discriminatory manner. Other recognized but less intrusive remedies than rigid quotas would include double filling[17] or, if all other less intrusive remedies failed, promotion goals for identified victims of past discrimination based on representation among fire fighters qualified for promotion or applicant flow. App. 47a. Under no circumstances, however, were the defendants justified in adopting a program where race was the only relevant criteria for promotional decisions and half of the jobs were set aside for blacks.

Second, the *Croson* Court wrote, "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." Thirty percent was a number arbitrarily chosen by the City of Richmond as a pure set aside. The Eleventh Circuit found that Birmingham's 50% set aside is not tied to any realistic goal.[18] App. 51a-52a. Half of the

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[16] The wide band certifications in *Paradise II* were recognized by the Eleventh Circuit as merit-based and fair to all applicants, regardless of race. *Paradise v. Prescott*, 767 F.2d 1514, 1537-1538 (11th Cir. 1985). *See also Bridgeport Guardians v. City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991) ("the banding remedy ordered by the district court provides some relief to other disadvantaged minority candidates by increasing at least the possibility that some of them will receive promotions").

[17] *See Youngblood v. Dalzell*, 804 F.2d 360, 363 (6th Cir. 1986).

[18] The City has acknowledged that the 50% set aside was not based on any appropriate criteria. See 1991-PX-1, Response 3. In earlier briefs in this litigation, Birmingham claimed the 50% quota was permissible because a 50% ratio was approved by this Court for the training program at issue in *Weber*. See, Eleventh Circuit case no. 86-7108, brief of defendant-intervenors Martin, et al. at 24; adopted by reference in City brief at 26, n.24. Such a position is without merit. The *Croson* Court rejected the notion that "findings" of discrimination or past societal discrimination can be shared from jurisdiction to jurisdiction. See, 488 U.S. 505. The approval in

(Footnote continued)

promotions were allocated to blacks at time when blacks represented between nine and thirteen percent of the relevant labor pool.[19] App. 53a. The Eleventh Circuit correctly determined that such a set aside is not designed to ensure against discrimination in making promotions but, like the program in *Croson*, is a program of outright racial balancing. App. 53a.

There is no dispute that the City implemented its quota program in a strict and unyielding manner. The City ignored the provisions of paragraph 2 of the Decree that allowed flexibility in its implementation. If blacks were certified, they were almost always promoted. Indeed, the district court interpreted the Decree as "requiring" a set aside of half the jobs for blacks. App. 79a-80a. Incredibly, at one point the City promoted seven blacks deemed "not qualified" by its own review board over available whites deemed qualified. 1991-PX-7 (pp. 165-71). Similarly, when the City exhausted the supply of available blacks from the 1982 and 1983 Fire Lieutenant registers, it stopped promoting anyone until a new register became available rather than promote white candidates. It is

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Weber of a 50% quota for a private sector training program at a plant in Louisiana hardly can serve to justify a 50% promotional set aside in the EFRS.

[19] *Compare, Stuart v. Roche*, 951 F.2d 446, 451 and 454 (1st Cir. 1991) (Breyer, Ch.J.) ("The Decree compares the number of black sergeants, not with the Boston population in general, but with those police officers with the minimum qualifications needed to become sergeants. Given the level of skill and training necessary to be a fire officer and the fact that all fire officers are drawn from the pool of incumbent fire fighters, it is undisputed that blacks represented some 9 to 13% of the relevant qualified labor pool. Reliance on the relevant labor pool is necessary in determining both the scope of the injury and the extent of the remedy necessary. "*Hazelwood [School District v. United States*, 433 U.S. 299 (1977)] demonstrates this Court's focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies." *Wygant*, 476 U.S. at 275.

undisputed that the City never considered qualifications of promotional candidates and promoted strictly on the basis of race. 1985-PX-31, 36; R5-276. The City used no job-related selection procedures and made no effort to implement such procedures. R5-276.

Birmingham did not narrowly tailor the Decree to the evidence produced at the earlier trials in the litigation. It aggressively implemented race-based programs that were consistent with its political agenda and significantly reduced its financial exposure. The Eleventh Circuit correctly found that the City plan is not narrowly tailored in the manner required by the Constitution.

III. The City Has Unlawfully Trammeled The Interests Of Plaintiffs In Violation Of Title VII.

The Eleventh Circuit also found that the City Decree, as implemented, unnecessarily trammeled respondents' interests in violation of Title VII. *See, Johnson*, 480 U.S. at 630. When the City injected race into the promotional process, it took on a corresponding duty to use race carefully and to the least extent necessary to achieve a remedial purpose. Rather than carefully tailor its program to ensure that nonminority expectations of promotion were not unreasonably curtailed, the City attacked the problem with the sledgehammer of a 50% quota. While the *Johnson* annual goal of 6% was considered realistic in view of the relevant qualified labor pool for the job at issue, the 50% annual goal here clearly is overbroad when one considers that blacks represented between 9 and 13% of the persons in the fire fighter classification during the years plaintiffs were denied promotions. The 50% quota was not tied to anything except outright racial balancing. App. 38a. The district court's Opinion identified no justification for such a goal. App. 71a, 81a.

In *Johnson*, this Court found the 6% interim annual promotional goal a realistic approach, based on the number of women in the qualified labor market, when women held none of the 238 positions in the relevant job classification. Perhaps more important, though, was the *Johnson* goal's reliance on individual qualifications as the paramount factor in evaluating candidates for promotion. No job was set aside for anyone. As in the Harvard plan approved by Justice Powell in *Bakke*, all candidates in Santa Clara program were carefully considered on the basis of their individual qualifications and no position was reserved on the basis of race or sex. While gender was a single "plus" factor in the evaluation process, qualifications controlled the final decision. On the other hand, this Court made clear that a plan which did not allow for the evaluation of relative qualifications and was based solely on achievement of numerical goals would not pass muster:

> By contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers . . . .

480 U.S. at 636. As the City freely admitted, the relative qualifications of competing black and white employees in the BFRS promotional process were not considered. App. 18a. The City engaged in the sort of "blind hiring by the numbers" condemned in *Johnson*. The BFRS Chiefs acknowledged their firm obligation to meet the 50% set aside so long as the Board certified blacks. *Id.* The only factors considered in appointing

the black candidates were the fact of certification and race.[20] Such an inflexible program of set asides unnecessarily trammels the interests of nonminorities by completely shutting them out from half of the available jobs. In the promotional context, where the burden is not diffused over society generally, such trammeling is intolerable.

The Eleventh Circuit correctly found that the loss of a promotion is a serious injury warranting relief. App. 35a. First, the notion raised by the Martin petitioners that the burden on the respondents was slight is both offensive and wrong. Martin Pet. 17. Loss of a pay increase for working class families is a serious injury. Moreover, while some nonminorities received their promotions in a timely manner, others were denied promotion year after year, and others finally retired in frustration having never received their promotions.[21] The full impact of the promotional remedy fell on a small group of nonminority firefighters seeking promotion. The finding that the plan unnecessarily trammeled the interests of those individuals should be upheld. App. 34a-35a.

Defendants cannot contest the fact that they engaged in the sort of "blind hiring" by the numbers condemned in *Johnson*.

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[20] In upholding the plan in *Johnson*, Justice O'Connor noted that the employer "knew far more than merely the sex of the candidates and that they appeared on a list of candidates eligible for the job." 480 U.S. at 655-656. On the contrary, Justice O'Connor wrote, "an affirmative action program that automatically and blindly promotes those marginally qualified candidates falling within a preferred race or gender category, or that can be equated with a permanent plan of 'proportionate representation by race and sex,' would violate Title VII . . ." *Id.* The Eleventh Circuit correctly found this case presents exactly that sort of program.

[21] For example, respondent Chambers was denied a promotion in 1982 and never promoted prior to his recent retirement. Respondent Wilks was denied promotion for three successive years until he was finally promoted. Respondent Ware was never promoted to Civil Engineer.

Here, the district court and the persons responsible for implementing the program in the BFRS described the process as a set aside of 50% of the promotional positions for blacks. R1-110-8 and 10; 85-PX-31 (p. 217); 85 PX-36 (pp. 136-137, 175, 650); 85-DX-2235 (pp. 173, 176, 186). There was no careful investigation of qualifications. 85-PX-400 (pp. 422-426, 526, 527). There was no diffusing of the burden over a large group of individuals, no process to review the manner in which the program was implemented and no clearly defined annual period to assess progress. 85-PX-400 (pp. 468-470). There was no clearly defined time at which the program would end. 85-PX-400 (p.459). There was no less intrusive goal based on applicant flow, the relevant labor market or whether the preferred candidates were individual victims of past discrimination. While the City has claimed the Decree contains a "flexible waiver" provision in paragraph 2, it has acknowledged that it has ignored this provision. None of the plaintiffs had their individual qualifications considered or evaluated. Half the jobs were reserved for certified blacks. R1-110-10. Such a plan is clearly excessive and not worthy of further review by this Court.

Conclusion

For the foregoing reasons, the petitions for writ of certiorari should be denied.

March 23, 1995.

Respectfully submitted,

RAYMOND P. FITZPATRICK, JR.

Counsel of Record for Respondents
Robert K. Wilks, et al
Sixth Floor, Farley Building
1929 Third Avenue North
Birmingham, Alabama 35203
(205) 320-0555